Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MARIO ESPINOZA,

Petitioner,

vs.

THE STATE OF WYOMING,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, State Of Wyoming

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Supreme Court, State of Wyoming, has in this case delineated the requirements of *Brady vs. Maryland*, respecting improper prosecutorial suppression of evidence; the requirements of *Miranda vs. Arizona*, respecting advisement of rights; and the requirements of *Batson vs. Kentucky*, respecting discriminatory jury selection; different from the decisions of the United States Supreme Court and the decisions of other state courts of last resort.

II. Whether the prosecution improperly suppressed Petitioner's alleged out of court statement, in violation of Petitioner's substantial rights, which denied Petitioner a fair trial.

III. Whether Petitioner's alleged out of court statement was obtained without the required advisement of rights, which denied Petitioner a fair trial, and whether the state District Court erred by permitting evidence of Petitioner's alleged out of court statement to go to the jury, without a proper showing of the required advisement of rights, which denied Petitioner a fair trial.

IV. Whether the jury was selected in an inherently unlawful discriminatory manner, because the venire was not a representative cross section of the community, as required by the Constitution of the United States as interpreted by the United States Supreme Court, which denied Petitioner a fair trial, and whether the prosecution improperly removed the only two Hispanic veniremen by peremptory challenges without articulating a clear, non-discriminatory reason for doing so, as required by the Constitution of the United States as interpreted by the United States Supreme Court, which denied Petitioner a fair trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported as *Mario Espinoza vs. State of Wyoming* at 969 P.2d 542 (Wyo. 1998).

JURISDICTION

The date on which the highest state court, the Supreme Court, State of Wyoming, decided this case was December 10, 1998. A copy of that decision appears at Appendix A.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use without just compensation.

Constitution of the United States, Amendment VI: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Constitution of the United States, Amendment XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Mario Espinoza, a young Hispanic, was charged with selling marijuana on two separate occasions in February 1996 to a "confidential informant" ("CI") for the Wyoming Division of Criminal Investigation (DCI), who became a "CI" because he was facing similar felony sale charges. In early May 1996, the felony sale charges

against the CI were dismissed and misdemeanor possession charges were filed, to which he pleaded guilty and received probation.

Petitioner filed several pretrial motions, mailing them July 2, 1996, including *Defendant's First Motion For Discovery*, the operative paragraph seeking:

> "h. Copies (whether written, typed, recorded by electronic means, or otherwise) of any statements alleged to have been made by Defendant, whether inculpatory or exculpatory, to any law enforcement officer or to any agent, including civilian agents, of any law enforcement agency; Defendant's counsel wishes to know whether there are any statements alleged to have been made by Defendant."

A letter from Petitioner's counsel to the Assistant County Attorney, dated July 2, 1996, serving the Motions on her contained similar language:

> "h. Copies (whether written, typed, recorded by electronic means, or otherwise) of any statements alleged to have been made by my client, whether inculpatory or exculpatory, to any law enforcement officer or to any agent (including civilian agents) of any law enforcement agency; I wish to know whether there are any statements alleged to have been made by my client, and if so, the contents thereof."

The Assistant County Attorney prematurely filed a *Notice of Compliance with Defendant's Demand for Disclosure* on July 2, 1996 (Petitioner's Motion and letter request hadn't been received by her, yet), stating that all discoverable materials had been provided to Petitioner's counsel to that date. Further, during a hearing on the pretrial

motions held September 9, 1996, the County Attorney (with the Assistant County Attorney sitting at counsel table) assured both the Court and Petitioner's counsel that except for one audio tape of one of the alleged incidents, which would be provided, all of the requested discovery had been provided (that missing audio tape was later provided to Petitioner's counsel as a blank tape). **Neither the County Attorney nor the Assistant County Attorney disclosed then or at any time before trial that any out of court statement had been made by Petitioner to anyone. Further, neither the County Attorney nor the Assistant County Attorney disclosed then or at any time before trial that they were relying on the Preliminary Hearing as providing any of Petitioner's requested discovery.**

Trial was held beginning October 7, 1996. A 40 person venire was called, 32 were seated, two of whom (5% of 40, 6.25% of 32) were Hispanic. There were challenges for cause of other veniremen; neither of the Hispanic members of the venire were challenged for cause. The prosecution challenged both Hispanic veniremen peremptorily, leaving a jury of all white jurors.

Not recognizing the constitutional import of the composition of the jury, Petitioner's counsel, the undersigned, did not raise the issue at trial. Counsel raised it in Petitioner's timely *Motion For New Trial* (Appendix C), which was denied by the trial court (Appendix D). Petitioner again raised it as part of his appeal to the Wyoming Supreme Court (Appendix H), which was addressed as part of the Wyoming Supreme Court's Opinion (Appendix A).

The only testimony linking Petitioner Mario Espinoza to either of the allegations of sale came from the informant, because his "handlers", DCI agents Haller and Webster, were never in a position to visually observe either alleged transaction, nor was their electronic surveillance equipment able to record sufficient conversation to substantiate either alleged transac ion.

But agent Haller testified that at the time he arrested Petitioner, he interviewed him after advising him of his *Miranda* rights, showed him the charging documents, and asked him if the documents were true or false. Over the objection of Petitioner's counsel, he testified that Petitioner answered, "Mostly true." **Taken completely by surprise because there had been no previous disclosure of any alleged inculpatory statement**, Petitioner's counsel argued to the Court in front of the jury that the *Miranda* advisement was insufficient, *Haller having testified that he did not ask Petitioner whether he either understood his rights or wished to talk to an attorney*. Record: Volume II, page 238.[1]

Well before *Miranda*, the Supreme Court made it clear that there was a denial of due process if the issue of

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[1] BY MR. ALBURN:

Q. Now, let's move up to May 9th. That's the day you arrested Mario, right?

A. That's correct.

Q. Did you ask Mario if he wanted to talk to an attorney?

A. Through his Miranda advisement, yes, I did.

Q. No, no, no. The question is: Did you ask him if he wanted to talk to an attorney?

A. Yes.

voluntariness of a "confession" was submitted to the jury before being first examined out of their hearing by the

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Q. You know, if you look at your card, you go through these different rights that you testified to?

A. Right.

Q. And then the first question right afterwards on every card I've ever seen says, do you understand your rights? The second question is: Do you wish to talk to an attorney? Right? Isn't that right?

A. That's not the way I observed it. The first question would be, you have the right to remain silent.

Q. No, no, no. Those aren't questions. Those are statements. You start off with, you say you have the right to remain silent. Anything you say can and will be used against you. You also have the right to an attorney. If you cannot afford an attorney, an attorney will be given to you.

A. Right.

Q. Then you say, in question form, do you understand your rights? And then you say, after he says yes or no, do you wish to talk to an attorney? The question I'm asking you is: ***Did you specifically ask him, in question form, do you wish to speak to an attorney?***

A. **I can't say as I did. I don't remember that.**

Q. Mario asked you, "What is a CI?", didn't he?

A. Yes, I believe he did.

Q. And then he said he wanted to talk to an attorney. Me.

A. After another statement, yes.

Q. ***So you never asked him if he wanted to talk to an attorney, but he told you anyway, because I'm his family attorney.***

A. **I advised him of his Miranda rights. He made a statement and then asked for that.**

[All emphasis supplied].

trial judge.[2] But the Court denied Petitioner's counsel's motion to strike and request for cautionary instructions; even such minimal palliative actions were denied.

The defense case in chief was limited to attempting to discredit agent Haller and the Confidential Informant. Petitioner did not testify.

During the period of time that the jury was deliberating, they submitted various questions to the Court, among which was:

> "2. May we see original chargeing papers which He apparently agree to." [errors in the original].

The Judge correctly denied the jury's request.

The jury thereafter found Petitioner guilty of both charges. Petitioner submitted a timely *Motion for New Trial* (Appendix C) alleging among other things prosecutorial misconduct in the improper suppression of the alleged statement "Mostly true" and discriminatory jury selection. The *Motion for New Trial* was orally denied after a hearing held December 6, 1996, just within the deadline provided by the Wyoming Rules of Criminal Procedure, with the written Order (Appendix D) following on December 16, 1996.

As part of "discovery", the Assistant County Attorney had provided two audio tapes to Petitioner's counsel of the Preliminary Hearing, the second of which was blank (no distinguishable sounds) and a purported transcript that stated "TAPE TWO OF TWO, INAUDIBLE".

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[2] *Jackson vs. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

She had stated in her *Traverse to Defendant's Motion for New Trial* (Appendix E) and again in oral argument on the *Motion* (Appendix I) that the alleged statement "Mostly true" had been shared with Petitioner's counsel at the Preliminary Hearing (claiming that Petitioner's counsel had specifically cross examined witness Haller about Petitioner's arrest and that Haller had so testified) but that the audio tape of that portion of the hearing did not record because of an equipment malfunction. Petitioner's counsel vehemently denied the Assistant County Attorney's assertions, but in the absence of an audio tape to prove the contrary was unable to persuade the District Judge.

Although expressing that he was bothered by the absence of any filing in the District Court reflecting that the prosecution had honored Petitioner's request for any out of court statement, the District Judge indicated that he was accepting at face value the Assistant County Attorney's statements that disclosure had occurred as she had asserted.

On December 19, 1996, Petitioner's counsel learned from the Clerk of the District Court that both original tapes of the Preliminary Hearing were in the Clerk's custody. On December 20, 1996, the Clerk played the second tape over the telephone to Petitioner's counsel. **Both tapes, including the alleged blank second tape, clearly and accurately recorded all events at the Preliminary Hearing,** from the time the Preliminary Hearing was called to order until Petitioner was bound over. **The recordings failed to substantiate either of the Assistant County Attorney's substantive assertions,** either that Petitioner's counsel had cross examined agent Haller

about the arrest or that there had been any mention of any out of court statement by Petitioner during any of the Preliminary Hearing.

On that same day, December 20, 1996, Petitioner's counsel mailed a *Motion for Reconsideration of Motion for New Trial* (Appendix F), which because of the Christmas holiday period, was filed on December 26, 1996. The District Judge was urged to reconsider his ruling denying the *Motion for New Trial*, in light of the revelations of egregious prosecutorial misconduct, the Assistant County Attorney's misleading the Court and Petitioner's counsel about the existence of facts that were not true. In her *Traverse* to the *Motion for Reconsideration* (Appendix G), filed January 7, 1997, the Assistant County Attorney admitted that the second tape actually did record and that Petitioner's counsel had not learned of any out of court statement by his cross examination of the State's chief witness during the Preliminary Hearing. She expressed that she had made a good faith mistake and her opinion that anyway, it was harmless error not to comply with Petitioner's counsel's discovery request.

The District Judge summarily denied the *Motion for Reconsideration* on January 8, 1997, (Appendix J) before Petitioner's counsel had even received the *Traverse* and without being given an opportunity to offer a *Reply*.

Petitioner was orally sentenced on January 27, 1997, to serve concurrent terms of 2 to 4 years in the State Penal System on each Count, pay $520.00 restitution to the State, and pay $50.00 on each Count to Victims' Compensation. His sentence of imprisonment was suspended on

the condition of 3 years supervised probation. The sentencing order was signed the following day and entered on January 29, 1997.

REASONS FOR GRANTING THE PETITION

A. Right to counsel.

The Wyoming Supreme Court, until this case, has consistently followed the lead of the United States Supreme Court respecting the advisement of rights requirements of *Miranda vs. Arizona*.[3] Those requirements appear to be unequivocal, that for any statement of a suspect to be admissable, he must be in a custodial situation (as was Petitioner), and he must be advised, among other things, of his right to counsel. Most importantly, *before* asking any questions, *the interrogator must be assured that a suspect knows and understands his rights*. It is Petitioner's position that unless a suspect is asked whether he understands and is further asked whether he wishes to have counsel, or in some other manner before being questioned clearly demonstrates to the interrogator that he understands his right to counsel before answering any questions, there is no way that an interrogator can be certain that the suspect understands his rights.

But the Wyoming Supreme Court has concluded *in this case* that because the Petitioner *later* decided to seek the advice of counsel *after* he had been questioned, he

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[3] *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). See *Dryden vs. State*, 535 P.2d 483 (Wyo. 1975); *Best vs. State*, 736 P.2d 739 (Wyo. 1987).

must have been properly advised and must have understood his rights at the time he allegedly responded in an inculpatory way to the interrogator's question. This circular reasoning is not the law as the Wyoming Supreme Court has previously expressed it,[4] and most certainly not as this Court has expressed it.

The Wyoming Supreme Court, until this case, has also consistently followed the lead of the United States Supreme Court respecting the *demonstration* of proper advisement of rights requirements of *Miranda vs. Arizona*, before the alleged out of court statement may be admitted.

But in this case, the Wyoming Supreme Court has retreated from any such requirement. The evidence at trial was clear that the demonstration of proper advisement of rights was deficient, failing to comply with the requirements that this Court has set forth in numerous cases since *Miranda* was decided.[5]

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[4] *Dryden vs. State*, 535 P.2d 483 (Wyo. 1975); *Best vs. State*, 736 P.2d 739 (Wyo. 1987); *Kolb vs. State*, 930 P.2d 1238 (Wyo. 1996); *Witt vs. State*, 892 P.2d 132 (Wyo. 1995); *Southworth vs. State*, 913 P.2d 444 (Wyo. 1996).

[5] "For the fruits of post indictment interrogations to be admissable in a prosecution's case in chief, *the State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel.*" *Michigan vs. Harvey*, 494 U.S. 344, 110 S.Ct. 1176 at page 1179, 108 L.Ed.2d 293 (1995). [Citing cases] [emphasis supplied]. See also *Michigan vs. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Minnick vs. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); *Thompson vs. Keohane*, 116 S.Ct. 457 (1995). Cf. *Harris vs. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), allowing use of statements taken in violation of *Miranda* for impeachment purposes.

Thus, this case marks a deviation by the Wyoming Supreme Court from the law as required by this Court. If the Wyoming Supreme Court continues to follow this case as precedent, Wyoming will be an island in which the material and substantial rights of suspects can be disregarded by investigators, with impunity.

B. Discriminatory Jury Selection.

The Wyoming Supreme Court, in this case, has disregarded this Court's mandates in *Taylor vs. Louisiana* and its progeny[6] by placing an unconscionable burden upon defendants to prove discriminatory jury selection. It appears to be reverting to pre-*Taylor* Wyoming decisions (without citing them), which placed a nearly impossible standard upon defendants to show discriminatory jury selection.[7] *Taylor* can be summarized in one statement:

> " . . . [T]he selection of petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[8]

The Wyoming Supreme Court's "head in the sand" approach, disregarding the import of the percentages of

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[6] *Taylor vs. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Castaneda vs. Partida*, 430 U.S. 460, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Duren vs. Missouri*, 439 U.S. 355, 94 S.Ct. 664, 58 L.Ed.2d 579 (1979); *Powers vs. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

[7] *Boyd vs. State*, 528 P.2d 287 (Wyo. 1974); *Lofton vs. State*, 489 P.2d 1169 (Wyo. 1971); *Simms vs. State*, 492 P.2d 516 (Wyo. 1972).

[8] *Taylor vs. Louisiana*, 95 S.Ct. 692 at 697.

Hispanics in either Rawlins (20.4% Hispanic) or Carbon County (13.9% Hispanic) versus the percentage of Hispanics on the venire (5%), decries the obvious.

The Wyoming Supreme Court also myopically minimized the requirements of *Batson vs. Kentucky* and its progeny[9] for the prosecutor to show nondiscriminatory peremptory challenges to the jury. Plain and simple, the prosecutor's later explanation was insufficient to be a "neutral explanation". The basis for the prosecutor's peremptory challenges was not stated at trial, but was only stated during the subsequent hearing upon the *Motion For New Trial*. He asserted that because both Hispanic veniremen knew the Petitioner and he had been in their homes, that would be enough.

The voir dire process revealed no prosecutorial attempt to challenge either Hispanic veniremen for cause and no indication that either of them would fail to adhere to the requirements placed on all jurors by the instructions. In fact, the prosecutor's probing questions of one of the veniremen instead showed a determination by her to be a fair and impartial juror. Record: Volume I, pages 23 through 25.

In a small town like Rawlins, Wyoming, it should be expected that many members of an ethnic minority will know one another. Had there been a fair representation of the community on the venire panel to begin with, however, that likelihood would have been undoubtedly

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[9] *Batson vs. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); cf. *Holland vs. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990).

diminished. In essence, however, the Wyoming Supreme Court is willing to accept the prosecutor's assertion that he did not discriminate, with only the weakest of explanations for his actions.

It is essential that all jurisdictions in the United States, including even the sparsely populated wide open spaces of Wyoming with its tiny communities, avoid all indications of improper discrimination in the enforcement of its laws, whether that be in the early processes of arrest and detention or in the formalities of a jury trial. Juries that are formed from panels that do not fairly represent the composition of the community, and prosecutors that systematically remove members of any ethnic minority, whether of a defendant's ethnicity or of any other ethnicity, should be abhorred and discouraged by all supervising courts with the strongest of sanctions.

C. Improper suppression of evidence by prosecutor.

The Wyoming Supreme Court wholly fails to recognize the importance of the prosecutor's failure to honor Petitioner's discovery requests, and wholly fails to acknowledge that this Court long ago concluded in *Brady vs. Maryland*[10] that "good faith" suppression by a prosecutor is not a proper test. Stating that the District Judge

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[10] *Brady vs. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) at 83 S.Ct. 1196:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

was in the best position to determine whether the prosecutor acted in good faith, i.e., that her failure to provide such a material part of discovery as an alleged inculpatory out of court statement, was "not intentional", the Wyoming Supreme Court apparently approves the "good faith" test. The Wyoming Supreme Court's position in this case is especially curious, because in a series of cases, from which it now retreats by using the "good faith" test, it clearly followed the spirit and intent of *Brady* and subsequent cases[11], virtually paraphrasing in *Dodge* this Court's language in *U.S. vs. Agurs.*[12]

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[11] See especially *Dodge vs. State*, 562 P.2d 303 (Wyo. 1977):

> "There is no general constitutional right to discovery in a criminal case [citing cases]. This does not mean that the prosecution can suppress evidence favorable to the Appellant. Suppression of evidence favorable to the accused upon request violates due process where the evidence is material to guilt" [citing *Brady vs. Maryland*, supra].

See also *Talbott vs. State*, 902 P.2d 719 (Wyo. 1995); *Roderick vs. State*, 858 P.2d 538 (Wyo. 1993); *Young vs. State*, 849 P.2d 754 (Wyo. 1993); *Relish vs. State*, 860 P.2d 455 (Wyo. 1993); and *Phillips vs. State*, 835 P.2d 1062 (Wyo. 1992).

[12] "Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable." *U.S. vs. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) at 96 S.Ct. 2399.

Here, the alleged out of court statement by the Petitioner, presented at trial as a total surprise in violation of concepts of fundamental fairness by a suppressing prosecutor (regardless of whether she acted in good faith or intentionally), obviously carried significant weight with the jury. They had only the suspect testimony of the "confidential informant" to otherwise connect Petitioner to any crime, because as the evidence showed, the "handlers" of the CI were unable to observe him through nearly all of his alleged activities, nor were they able to monitor him through their failed electronics.

For all practical purposes, the prosecution's case rested upon the integrity of the CI, who was facing virtually identical criminal charges, and the alleged two word "confession" of the Petitioner.

It is essential that every defendant in every trial in the United States receive a fair trial. Discovery rules such as those which appear in the Federal Rules of Criminal Procedure and the Rules of Criminal Procedure of most states, including Wyoming, as well as within the case law of this Court and virtually all courts of record throughout the nation, including Wyoming, must not be lightly disregarded. A criminal trial by ambush carries with it the very real risk that an innocent defendant will be convicted, unless the courts prevent improper tilting of the playing field by a prosecutor who suppresses material evidence. The effect of denying to a defendant such material evidence as his alleged out of court statement is just as serious, whether that suppression of material evidence is intentional or negligent or merely careless.

D. Summary of Reasons For Granting The Petition.

This Honorable Court should grant this Petition, so that Wyoming, although the least populated of the 50 states, is required to comply with the same fundamental fairness requirements as all other jurisdictions must. The small towns of rural America must not be permitted to be havens of discrimination in the selection and seating of jurors, they must not be allowed to disregard basic and fundamental rights to counsel at the earliest stages of proceedings, and they must not be permitted to revert to the inequities of the ancient Star Chamber by permitting a "good faith" exception to fair dealing between prosecutor and defense attorney.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: March 10, 1999

APPENDIX A

IN THE SUPREME COURT,
STATE OF WYOMING

October Term, A.D. 1998
December 10, 1998

MARIO ESPINOZA,	)	
Appellant	)	
(Defendant),	)	
	)	
v.	)	*No. 97-69*
THE STATE OF WYOMING,	)	
	)	
Appellee	)	
(Plaintiff).	)	

Appeal from the District Court of Carbon County:
The Honorable Ken Stebner, Judge

Representing Appellant:
Cary R. Alburn III of Alburn & Earnshaw, P.C., Fort Collins, CO. Argument by Mr. Alburn.

Representing Appellee:
William U. Hill, Attorney General; Paul S. Reburek, Deputy Attorney General; and D. Michael Pauling, Senior Assistant Attorney General. Argument by Mr. Pauling.

Before **LEHMAN, C.J.**, and **THOMAS, MACY, GOLDEN,** and **TAYLOR,*** **JJ.**

LEHMAN, Chief Justice.

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* Chief Justice at time of oral argument; retired November 2, 1998.

Appellant Mario Espinoza was convicted of two counts of delivering a controlled substance. He appeals the judgment and sentence, raising issues of prosecutorial misconduct, improper admission of an inculpatory statement, improper admission of prior bad acts evidence, and error in the jury selection process. Finding no reversible error, we affirm.

ISSUES

Espinoza presented eleven issues for our review, which we decline to list here. The State succinctly summarizes the issues as:

> I. Did the district court properly resolve all matters relating to the admission of appellant's statements to his arresting officer?
>
> II. Did the district court properly resolve all matters relating to the admission of evidence touching upon appellant's uncharged misconduct?
>
> III. Did the district court properly resolve appellant's post-trial challenges to the composition of his jury?

Espinoza's claims of prosecutorial misconduct are among the "matters" resolved by the district court with respect to each of the three issues listed above.

FACTS

In February 1996, an informant working with the Division of Criminal Investigation (DCI) made two controlled buys of marijuana from Espinoza. On May 9, 1996,

Espinoza was arrested and charged with two counts of delivering a controlled substance, in violation of W.S. 35-7-1031(a)(ii) (1997). Espinoza was tried in October 1996, and the jury found him guilty on both counts. Espinoza filed a post-trial motion for new trial on the grounds of prosecutorial misconduct and discriminatory jury selection, which the court denied. He subsequently filed a motion for reconsideration of the motion for a new trial, focusing on the allegations of prosecutorial misconduct, which was also denied. Espinoza timely appeals the judgment and sentence entered on January 29, 1997. Additional facts relevant to specific issues will be set forth in our discussion of those issues.

DISCUSSION

Out-of-Court Statements

During trial, Detective Kebin Haller gave an account of Espinoza's arrest, indicating that he advised Espinoza of his *Miranda* rights and allowed him to read the affidavit supporting the charges against him. Detective Haller then testified that he asked Espinoza whether the contents of the affidavit were mostly true or false and that Espinoza responded, "Mostly true." This testimony forms the basis for a number of Espinoza's allegations of error.

Espinoza claims that his out-of-court statement was admitted in error because he was not properly advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He frames his argument narrowly, contending that the *Miranda* warnings given by Haller were deficient because Haller did not specifically

ask Espinoza if he understood his right to an attorney and if he wanted an attorney present during questioning. Without that specific inquiry, claims Espinoza, there can be no assurance that a defendant has knowingly and intelligently waived that right.

Miranda requires police to inform an accused during a custodial interrogation that 1) he has the right to remain silent, 2) that anything said may be used against him in court, 3) that he has the right to have an attorney present at questioning, and 4) that, if he cannot afford to retain an attorney, one will be appointed for him. *Miranda v. Arizona*, 384 U.S. at 467-73, 86 S.Ct. at 1624-27; *Kolb v. State*, 930 P.2d 1238, 1240 (Wyo. 1996); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.8(a) (1984). Whether a defendant has "knowingly and intelligently" waived his rights depends in part upon his ability to understand and act upon the warnings which *Miranda* requires. *Kolb*, 930 P.2d at 1244, LAFAVE & ISRAEL, *supra*, § 6.9(b).

Haller testified that he administered the required warnings by reading from his "*Miranda* card." He asked Espinoza if he understood his rights, and Espinoza replied that he did. The record contains no indication that Espinoza lacked the capacity to understand the warnings. Moreover, shortly after responding to Detective Haller's question regarding the accuracy of the affidavit, Espinoza invoked his right to counsel, indicating a full and intelligent awareness of his *Miranda* rights. *See Kolb*, 930 P.2d at 1244. Haller complied with the mandates of *Miranda*, and Espinoza's claim that follow-up questions were necessary is without merit. The district court did not err

when it denied Espinoza's motion to strike his inculpatory statement.

Espinoza next alleges error because the argument concerning the admissibility of his out-of-court statement should not have been heard in front of the jury. Hearings on the admissibility of confessions must be conducted outside the hearing of the jury, and the court should conduct other proceedings, to the extent practicable, so as to prevent the jury from being exposed to inadmissible evidence. W.R.E. 103(c), 104(c). However, the manner in which Espinoza challenged Detective Haller's testimony prevented the trial court from giving full effect to the rules of evidence.

Espinoza initially halted Haller's testimony during direct examination by objecting to the foundation concerning the *Miranda* warnings Haller gave to Espinoza. Haller then testified to the specifics of the warnings he gave, without objection, and related Espinoza's statement, also without objection. Espinoza did not request a hearing with respect to the admissibility of his statement or seek to question Detective Haller outside the jury's presence. Instead, during cross-examination he further questioned Haller on the particulars of the *Miranda* warnings, and then moved to strike the evidence of his statement:

> [Espinoza's Attorney]: Your Honor, at this time, we move to strike and ask the jury be instructed that any statement of an inculpatory nature that Mario Espinoza may have made after this so called advisement of rights is inadmissable [sic] on the grounds that this officer failed to tell him his Miranda rights * * * .

Espinoza then proceeded to argue his position in front of the jury, without seeking so much as a bench conference to discuss the matter out of earshot of the jury. Under these circumstances, the court did not err. In any event, as discussed above, Espinoza was adequately apprised of his *Miranda* rights, and his motion to strike was properly denied. Consequently, the jury was not exposed to inadmissible evidence, and Espinoza was not prejudiced.

We turn now to Espinoza's claim of prosecutorial misconduct, which he first raised in his motion for new trial. The decision to grant or deny a motion for new trial is within the sound discretion of the trial court, and we defer to the ruling of the trial court unless the appellant demonstrates an abuse of discretion. *Relish v. State*, 860 P.2d 455, 458 (Wyo. 1993). The same standard is applied to the decision of a court in dealing with a breach of any discovery order. *Lindsey v. State*, 725 P.2d 649, 655 (Wyo. 1986). An abuse of discretion has been described as a ruling which exceeds the bounds of reason under the circumstances. *Ross v. State*, 930 P.2d 965, 968 (Wyo. 1996). In determining whether there has been an abuse of discretion, the ultimate question is whether the court could reasonably conclude as it did. *Rubio v. State*, 939 P.2d 238, 241 (Wyo. 1997).

Espinoza contends that the prosecution did not honor his reasonable and timely discovery request for any pretrial statements, and affirmatively misrepresented the reasons therefor to the district court. He argues that this misconduct resulted in unfair surprise and denied him the right to a fair trial.

Although the State filed a notice that it had fully complied with Espinoza's discovery requests, the prosecution failed to disclose Espinoza's "mostly true" statement to Detective Haller prior to trial. In the State's traverse to Espinoza's motion for new trial, the prosecutor reiterated that the State had fully complied with discovery obligations and related that Espinoza's statement was shared with the defense during the preliminary hearing. As part of discovery, the prosecutor had provided Espinoza with two audio tapes of the preliminary hearing, one of which was blank, along with an accompanying transcript page stating that tape two was inaudible. The recorded portion contained no discussion of Espinoza's pre-trial statement. In the hearing on the new trial motion, the prosecutor represented to the court that the second tape of the preliminary hearing was not transcribable and the county court had had problems with their tape machine not working, but that she spoke with Detective Haller and he remembered testifying about Espinoza's statement during the preliminary hearing. It was later discovered that the original tapes recording the entire preliminary hearing were in the possession of the district court, both tapes were clearly audible, and neither revealed any discussion or testimony regarding Espinoza's statement. In the State's traverse to Espinoza's motion for reconsideration, the prosecutor stated that she assumed the original tape was inaudible without listening to it, but the problem apparently arose in duplication. The prosecutor acknowledged that, after listening to the tapes in their entirety, it was clear Detective Haller did not testify about Espinoza's statement at the preliminary hearing, but maintained that she had relied on her own

and Detective Haller's memories of the hearing in good faith. The State's position is that the failure to provide discovery was unintentional and harmless in light of the overwhelming evidence against Espinoza.

The district court conducted a hearing on Espinoza's motion for a new trial. The parties explained their respective positions and answered questions from the court. The court expressed concern about the potential surprise to Espinoza because he was not provided with the "mostly true" statement in the discovery process. However, the court made a factual finding that the State's failure to disclose the statement was not intentional on the State's part. The court also determined that the record contained sufficient evidence for the jury to find as they did regardless of that testimony. The trial court was in the best position to make those determinations, *see Warner v. State*, 897 P.2d 472, 474 (Wyo. 1995), and we conclude that the district court properly exercised its discretion when it denied the motion for new trial based on prosecutorial misconduct and discovery violations.

Evidence of Prior Misconduct

Prior to trial, Espinoza filed a motion in limine seeking to prohibit the State from presenting allegations of uncharged misconduct by Espinoza. The court granted the motion in limine, stating:

> At trial, the State will refrain from commenting on any uncharged conduct that the Defendant is alleged to have committed unless the State gives proper notice as required by the Wyoming Supreme Court.

During the State's redirect examination of Detective Haller, the prosecutor inquired into a confrontation between Haller and Espinoza which had taken place in January 1996, a few weeks before the first controlled buy from Espinoza. When asked why he confronted Espinoza, Haller responded that he had received information from various sources in Rawlins that Espinoza had a large quantity of marijuana at his house. Espinoza immediately requested a meeting in chambers and moved for a mistrial for violation of the court's order and the notice requirements for prior bad act testimony. The court agreed with the State that Espinoza had opened the door to the testimony and denied the motion. Espinoza raised the issue again in his motion for new trial, which the court also denied.

On appeal, Espinoza challenges the court's denial of his motions. The court's ruling on a motion for mistrial, as with a new trial motion, is reviewed for an abuse of discretion. *Ross v. State*, 930 P.2d at 968.

In chambers, the State contended that Detective Haller's testimony did not violate W.R.E. 404(b) because Espinoza opened the door to that testimony. "A defendant may 'open the door' on cross-examination to evidence of prior criminal misconduct." *Chavez-Becerra v. State*, 924 P.2d 63, 69 (Wyo. 1996); *see also Reinholt v. State*, 601 P.2d 1311, 1317 (Wyo. 1979). When the defendant initiates a line of questioning, the prosecutor is entitled to make a permissible inquiry without crossing into prosecutorial overkill. *Chavez-Becerra*, 924 P.2d at 69. Espinoza's theory of defense was that Haller bore a grudge against him which motivated unprofessional conduct in his handling of the case in the form of harassment

and entrapment of Espinoza. During his cross-examination of Haller, the following exchange occurred:

> Q [Espinoza's attorney]: Yeah. Now before all of this came around, you went and visited with Mario at his place of work in January of '96, didn't you?
>
> A [Detective Haller]: It was around that date, yes.
>
> Q: Yeah. And basically told him, clean up your act or I'm going to come get you, right?
>
> A: I had received some information that led me to Mario. I went and had a conversation with him and told him, get out of it now or you and I will meet again, yes.

During redirect, the prosecution asked:

> Q: Finally, sir, Counsel for the Defendant asked you if you had confronted Mario in approximately January of '96.
>
> Do you recall that?
>
> A [Detective Haller]: Yes, I do.
>
> Q: What reason did you confront him?
>
> A: I had received information again from various sources in Rawlins. One person wished to remain anonymous. They advised me that Mario Espinoza had a large quantity of marijuana at his house.

The prosecutor permissibly inquired and clarified that Haller's meeting with and comments to Espinoza were made during the course of his duties as a law enforcement officer, and not motivated by personal feelings. We

agree with the district court that the defense opened the door to that testimony. *Reinholt*, 601 P.2d at 1317; *Fortner v. State*, 843 P.2d 1139, 1147-49 (Wyo. 1992). Further, the prosecutor did not exploit Detective Haller's response, and ended the redirect examination at that point. The trial court did not abuse its discretion when it denied Espinoza's motion for mistrial based on the prior bad act testimony, or when it denied Espinoza's new trial motion grounded in the same complaint.

Jury Selection

The venire from which Espinoza's jury was drawn included two individuals with Hispanic surnames, both of whom were peremptorily challenged by the State. Espinoza claims the composition of the venire violated the "fair cross section" requirement of the Sixth Amendment to the United States Constitution. He also asserts an equal protection violation, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), based on the State's use of its peremptory challenges. These matters were raised for the first time in Espinoza's post-trial motion for new trial.

To establish a prima facie "fair cross section" violation, Espinoza was required to show: 1) that the group allegedly excluded from the venire is a distinctive group in the community; 2) that the group's representation in venires is not fair and reasonable in relation to its numbers in the community; and 3) that the group's underrepresentation in venires is due to systematic exclusion attributable to the process by which venire members

are selected. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979).

Espinoza's showing in this regard is inadequate. He offered no proof whatsoever of the process by which venire members are selected in Carbon County and, consequently, did not demonstrate that Carbon County's selection procedures resulted in Hispanics being underrepresented in venires over time. As a result, Espinoza fails to establish a prima facie case, and we will not further consider his challenge to the composition of the venire.

In *Batson v. Kentucky*, the United States Supreme Court held that, although a defendant has no right to a petit jury composed in whole or in part of persons of his own race, the State may not exercise its peremptory challenges to purposefully exclude members of the defendant's race solely because of race. 476 U.S. at 85-86, 106 S.Ct. at 1717.

> [A] defendant can establish a prima facie case of purposeful discrimination in selection of the petit jury [by showing first] that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact * * * that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Bueno-Hernandez v. State, 724 P.2d 1132, 1134 (Wyo. 1986), *cert. denied*, 480 U.S. 907, 107 S.Ct. 1353 (1987) (quoting *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. at 1723 (citations omitted)). Once the defendant makes a prima facie showing, the State has the burden of coming forward with a neutral explanation for challenging the jurors. *Id.* The prosecutor's explanation need not rise to the level justifying a challenge for cause, but requires more than a mere denial of discriminatory motive or a statement that the challenge was based on the assumption that members of the defendant's race would be partial to the defendant because of their shared race. *Id.*

Here, the prosecutor offered a neutral explanation, unrelated to ethnicity, for challenging the venire members. The transcript of the voir dire proceedings substantiates the prosecutor's assertion that the two jury members in question knew Espinoza, their children were friends with him, and Espinoza had spent time at their homes. Therefore, even assuming that Espinoza established a prima facie case of purposeful discrimination, the prosecutor's explanation was sufficient to refute Espinoza's claim. *See Bueno-Hernandez*, 724 P.2d at 1135; *Evans v. State*, 653 P.2d 308, 310 (Wyo. 1982).

For the reasons stated above, the court did not abuse its discretion when it denied Espinoza's motion for a new trial based on discriminatory jury selection.

CONCLUSION

The judgment and sentence of the district court is affirmed in all respects.

APPENDIX B

STATE OF WYOMING)
: ss.
COUNTY OF CARBON)

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT
CRIMINAL DOCKET NO. 5137

THE STATE OF WYOMING
Plaintiff,
vs.
MARIO ESPINOZA,
Defendant.

(Filed Jan. 20, 1997)

JUDGMENT AND SENTENCE

THIS MATTER having come before the Court on January 27, 1997, for Sentencing of the Defendant; the Defendant appearing in person and with his attorney, Cary Alburn; the State of Wyoming being represented by Joy H. McMurtry, Deputy County and Prosecuting Attorney in and for Carbon County, Wyoming; the Defendant having been found guilty of two (2) counts of Delivery of a Controlled Substance by Jury Trial on October 7, 1996; the Court having ordered, received, and considered a Presentence Investigation filed in this matter; the Court having heard and considered the arguments of all parties

regarding sentencing, and the Court being otherwise well advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Mario Espinoza, shall be and is hereby adjudged guilty of the crime of two (2) counts of Delivery of a Controlled Substance in violation of § 35-7-1014(d)(xiii), W.S. 1977.

IT IS FURTHER ORDERED that the Defendant shall be and hereby is remanded into the custody of the Sheriff of Carbon County to be by him delivered into the custody and control of the Department of Correction to be incarcerated in a state penal institution designated by that Department for a period of not less than two (2) years nor more than four (4) years on each count to be served concurrently, the Defendant to be given credit for one (1) day previously served. The Defendant shall be assessed a Fifty Dollar ($50.00) surcharge for the Wyoming Crime Victims Compensation fund on each count for a total of One Hundred Dollars ($100.00) to be paid within ten (10) days.

IT IS FURTHER ORDERED that the Defendant shall pay restitution to the State through the Clerk of the District Court in the amount of Five Hundred Twenty dollars ($520.00).

IT IS FURTHER ORDERED that the sentence imposed herein shall be suspended in favor of three (3) years supervised probation with the Department of Corrections Division Field Services upon the following terms and conditions:

1. The Defendant shall not violate any law of any jurisdiction.

2. The Defendant shall obey the rules and regulations of the Division of Probation and Parole or any like agency to which the Defendant's supervision may be transferred.

3. The Defendant shall abstain from the use of alcoholic beverages and shall not use controlled substances unless prescribed by a certified physician.

4. The Defendant shall submit himself for random urinalysis or other tests of his breath or bodily fluids for detection of alcohol or controlled substances.

5. The Defendant shall pay restitution in the amount of Five Hundred Twenty Dollars ($520.00) in accordance with a payment schedule reached between the Defendant and his probation agent.

6. The Defendant shall obtain a substance abuse and mental health evaluation and comply in all respects with any and all treatment recommendations.

7. The Defendant shall pay a Fifty Dollar ($50.00) surcharge on each count for the Wyoming Crime Victims Compensation Fund within ten (10) days.

DONE IN OPEN COURT this 28 day of January, 1997.

/s/ Ken Stebner
DISTRICT COURT JUDGE

cc: County Attorney's Office
Defendant, c/o Cary Alburn
Cary Alburn
Carbon County Sheriff's Office
Carbon County Jail
Special-Agent Kebin Haller, Division Criminal Investigation
Rawlins Police Department Records
Department of Corrections Division Field Services, Rawlins Office 2-CERTIFIED COPIES

APPENDIX C

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT
Criminal Action No. 5137

STATE OF WYOMING)
) ss.
COUNTY OF CARBON)

STATE OF WYOMING,)
Plaintiff,)
vs.)
MARIO ESPINOZA)
Defendant)

MOTION FOR NEW TRIAL

COMES NOW the Defendant, Mario Espinoza, through counsel, and in accordance with Defendant's oral Motion For Extension of Time to File Motion for New Trial made to the Court immediately after the rendering of the jury's verdict on October 9, 1996, and the oral Order by the Court granting said Motion on that same date, wherein the Court ordered that Defendant would have the full period of time authorized by Rule 33(b), W.R.Cr.P., respectfully moves the Court for a New Trial, upon the grounds and reasons, as follows:

I. Prosecutorial misconduct.

A. Improper Suppression of Evidence.

1. Defendant's counsel made a *First Motion for Discovery*, seeking among other things, copies of all statements in any form elicited from Defendant. See paragraph h. of Defendant's *First Motion for Discovery*. The Deputy Prosecutor failed to respond to Defendant's reasonable discovery request, filed a response to the Court indicating compliance with Defendant's discovery request and emphasized that compliance in open court on September 6, 1996, and sent numerous letters to Defendant's counsel, providing various responses to Defendant's discovery requests, thereby misleading the Court and Defendant's counsel into believing that no such statement in any form had been elicited from Defendant. Attached hereto are copies of Defendant's *First Motion for Discovery* (Exhibit A), the cover letter sent to the Deputy Prosecutor serving the Motion upon her (Exhibit B), the Deputy Prosecutor's response entitled *Notice of Compliance With Defendant's Demand For Disclosure* (Exhibit C), and of all of the Deputy Prosecutor's letters received by Defendant's counsel after the discovery request had been made (collectively Exhibit D).

2. However, during trial, witness Kebin Haller was asked by the Deputy Prosecutor what Defendant's response was to being shown the charging documents upon Defendant's arrest, and Haller responded that Defendant told him that it was "mostly true".

Attached hereto is a Partial Transcript, heretofore filed by the official Court Reporter on October 16, 1996 (Exhibit E). See pages 3 and 4 of the attached Partial Transcript. This was the very first time that Defendant's counsel became aware that the prosecution was alleging that any statement had been made by Defendant. Defendant's counsel moved the Court to exclude the testimony upon failure to properly advise Defendant of his Miranda rights and for an instruction to the jury to disregard the testimony, which the Court denied.

3. That the alleged inculpatory statement, "mostly true", weighed heavily upon the jury's decision making process cannot be denied. The jury submitted written questions to the Court after commencing deliberation, one of which was precisely on this issue. Attached hereto are the questions of the jury and the Court's responses (Exhibit F).

B. Violation of Order in Limine.

The court had issued its Order in Limine, which ordered that the prosecution would refrain from commenting on any uncharged misconduct without proper notice to the Defense.[1] The Deputy Prosecutor disregarded

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[1] The Order in Limine appears as part of the Court's *Order Upon Defendant's Motions* of September 13, 1996, the relevant paragraph stating:

> "IT IS FURTHER ORDERED that the Defendant's Motion in Limine is granted with the following terms; At trial, the State will refrain from commenting on any uncharged conduct that the Defendant is alleged

the Court's Order in Limine during the course of trial, by eliciting an answer from the witness, Kebin Haller, that referred to uncharged misconduct. The questions and answers in that regard appear on page 10 of the Partial Transcript. In chambers, Defendant's counsel moved the Court for a mistrial on this issue, which motion was denied.

II. Discriminatory Jury Selection.

A. The Defendant is Hispanic, and is consequently a member of a class protected by law from illegal discrimination on the bases of ethnic origin. The initial jury venireman consisted of 40 persons, only two of whom (5%) were Hispanic or of Hispanic descent, Patsy Garcia and Cordelia Vasquez. No other jurors were of any apparent minority group, all appearing by both their surnames and their physical appearances to be Caucasian. Although the present demographics, i.e., as of October 1996, of Rawlins and Carbon County are difficult to ascertain, it is for certain that as of the official census of 1990, there were well more than 5% who were Hispanic, and there is no reason to believe that today's figures are significantly different. According to the Economic Analysis Division of the Wyoming Department of Administration and Information, in 1990 Rawlins was 20.4% Hispanic and Carbon County was 13.9% Hispanic, with few other minorities.[2] Attached hereto is the demographic information

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to have committed unless the State gives proper notice as required by the Wyoming Supreme Court".

[2] Rawlins: 77.0% White; 20.4% Hispanic; 1.0% Black; 1.0% American Indian, Eskimo, or Aleut; 0.6% Asian or Pacific Islander.

received from the Division (Exhibit G). Thus, the initial selection process was flawed, resulting in a venire panel that failed to represent the demographics of the community and thus denied Defendant the opportunity to be judged by a jury of his peers.

B. During the jury selection process, i.e., voir dire, the prosecution then eliminated by peremptory challenge the only two Hispanic veniremen, Ms. Garcia and Ms. Vasquez. Attached hereto are copies of the peremptory challenge slips submitted by the prosecution (collectively Exhibit H). The prosecution's peremptory challenges of Ms. Garcia and Ms. Vasquez further denied the Defendant the opportunity to be judged by a jury of his peers and thus denied him the fair trial guaranteed by the United States and Wyoming constitutions.[3]

ARGUMENT

I. Introduction.

It is axiomatic that any Defendant is entitled to a fair trial, free from prosecutorial misconduct and free from jury bias in the form of unlawful discrimination. He is further entitled to one of the basic of all of the protections afforded all persons charged with a crime, not to incriminate himself.[4] Thus, he is entitled not to testify, in fact, not to put on any evidence at all.

Carbon County: 84.2% White; 13.9% Hispanic; 0.6% Black; 0.8% American Indian, Eskimo, or Aleut; 0.5% Asian or Pacific Islander.

[3] Amendments VI and XIV, U.S. Constitution; Article I, § 10, Wyoming Constitution.

[4] Amendment V, U.S. Constitution; Article I, § 11, Wyoming constitution. See also *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) and *Dryden vs. State*, 535 P.2d 483 (Wyo. 1975).

Moreover, a Defendant's reliance upon his right *must not* come before the jury, whether such reliance occurred before trial or at trial.[5]

II. Prosecutorial Misconduct.

A. In this case, the Deputy Prosecutor knew full well that the Defendant was likely to choose not to take the stand because of pretrial discussions between the prosecutors and Defendant's counsel. Defendant's counsel made a written request and Motion for Discovery, which asked for any pretrial statements of Defendant. The Deputy Prosecutor misled both the Court and the Defendant's counsel by:

a. failing to advise Defendant's counsel of the intent to bring forth testimony that Defendant had made an inculpatory statement,

b. filing a response alleging full compliance with the discovery requests of Defendant's counsel, and

c. assuring both Court and Defendant's counsel in open court on September 6, 1996, that not only had the prosecution fully complied with Defendant's counsel's discovery request (except for a tape which she indicated would be provided, and which was) but that in the event there was any discoverable evidence not yet provided to Defendant's counsel, it would be provided in a timely manner.

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[5] See for instance, *Jerskey vs. State*, 546 P.2d 173 (Wyo. 1976).

A clearer violation of the spirit of the United States Supreme Court's mandate in *Brady vs. Maryland* would be hard to imagine.[6]

B. Further, a clearer compelling reason for new trial based upon surprise could not be made: Defendant's counsel asked for any statement of the Defendant, both informally and formally, Defendant's counsel didn't get the information, Defendant's counsel and the Court were led to believe there was no such information, and then the statement was dropped like a bomb in court. Although applicable to civil cases, the Wyoming Supreme Court's analysis of "surprise" as used in Rule 59, W.R.C.P., in *Richardson vs. Schaub* may be instructive.[7]

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[6] See *Brady vs. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 at 1196 (1963):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

See also *Roderick vs. State*, 858 P.2d 538 (Wyo. 1993), *Young vs. State*, 849 P.2d 754 (Wyo. 1993), and *Phillips vs. State*, 835 P.2d 1062 (Wyo. 1992). See especially *Dodge vs. State*, 562 P.2d 303 (1977):

> "There is no general constitutional right to discovery in a criminal case [citing cases]. This does not mean that the prosecution can suppress evidence favorable to the defendant. Suppression of evidence favorable to the accused upon request violates due process where the evidence is material to guilt" [citing Brady vs. Maryland, supra].

[7] *Richardson vs. Schaub*, 796 P.2d 1304 (Wyo. 1990):

(1) Was there actual surprise?

C. Without warning, the Deputy Prosecutor brought forth that testimony in open court in front of the jury, forever polluting the jury. The jury should *never* have heard Defendant's alleged statement. A review of the attached Partial Transcript reveals that, in fact, the advisement of rights was deficient, the Defendant not having been asked if he wished to consult with counsel and having been questioned *before* being given an opportunity to exercise the rights that Haller claims he advised. See pages 4, 5, 6, 7, 9, and 10 of the attached Partial Transcript. Not only were Defendant's Miranda[8] rights therefore denied him, but had Defendant's counsel known of the anticipated testimony, as he would have had the Deputy Prosecutor properly notified him of her intent to present the testimony, all of the discussions about rights would have been a pre-trial issue, handled with the other pretrial motions heard by the Court on September 6, 1996. This is mandatory, to hear such issues as pretrial matters, *out of jury earshot!*[9]

D. Under the circumstances at trial, even had the Court granted Defendant's oral Motion to Strike and

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(2) Did the facts have a material bearing on the issues presented by the case?

(3) Was the court's decision based primarily on those facts?

(4) Was the surprise a result of the inattentiveness or negligence of the moving party?

(5) Was the motion for new trial promptly filed?

(6) Did the moving party act reasonably at the time of the surprising event?

(7) Would a new trial probably achieve a different result?

[8] *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

[9] See *Witt vs. State*, 892 P.2d 132 (Wyo. 1995).

subsequent request for limiting instructions, the damage had been done. Any palliative efforts by Defendant's counsel to mitigate the damage was akin to locking the barn door after the horse is already in the next county. The damage was incalculable, but it is fair to assume, based upon the jury's written questions, that it was some of the most persuasive evidence the jury heard.

E. Then the Deputy Prosecutor compounded her misconduct by directly disregarding the Court's Order in Limine, not to bring out uncharged misconduct without proper notice to Defendant's counsel as required by the Wyoming Supreme Court.[10] The prosecution will argue that Defendant's counsel opened the door by asking witness Haller about a visit to Defendant at Defendant's place of employment (page 8 of the Partial Transcript), but a review of the questions and answers[11] reveals no opening of a door. To the extent that the Deputy Prosecutor

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[10] The Order in Limine appears as a part of the Court's *Order Upon Defendant's Motions* of September 13, 1996, the relevant paragraph stating:

> "IT IS FURTHER ORDERED that the Defendant's Motion in Limine is granted with the following terms; At trial, the state will refrain from commenting on any uncharged conduct that the Defendant is alleged to have committed unless the State gives proper notice as required by the Wyoming Supreme Court".

[11] BY MR. ALBURN:

Q. Yeah. Now, before all of this came around, you went and visited with Mario at his place of work in January of '96, didn't you?

A. It was around that date, yes.

Q. Yeah. And basically told him, clean up your act or I'm going to come get you, right?

elicited the following answer, it was the equivalent of driving a Mack truck through a brick wall:

> "I had received information again from various sources in Rawlins. One person wished to remain anonymous. *They advised me that Mario Espinoza had a large quantity of marijuana at his house.*" [Emphasis supplied].

See page 10 of the Partial Transcript. The Deputy Prosecutor was impliedly required to properly instruct witness Haller by the terms of the Order in Limine. If she had done so, or if he had followed such proper instructions, he would not have volunteered even the relatively innocuous answer in response to Defendant's counsel's questions. "I had received some information that led me to Mario," let alone the grossly improper answer quoted above.

III. Jury Bias.

A. One can never know whether a jury is in fact biased. Defendant's counsel went to great lengths to explore bias, principally racial bias with a touch directed toward other kinds of bias, but it is impossible to know how an all Caucasian jury in a town in which the principal ethnic minority, a very large ethnic minority, is Hispanic will react to the allegations against an Hispanic defendant. It is because of this very impossibility that *there is an absolute requirement of the choosing of a racially balanced jury venire*

A. I had received some information that led me to Mario. I went and had a conversation with him and told him, get out of it now or you and I will meet again, yes.

(i.e., a jury selected from a representative cross section of the community[12]) in the first instance,[13] and then significant protection from the efforts of over zealous prosecutors to dilute the racial balance of the jury by improper peremptory challenges.[14] The right to a proper jury accorded defendants under Amendment VI of the U.S. Constitution is binding upon the states in accordance with the provisions of Amendment XIV of the Constitution.[15]

B. But here, for reasons not known to or discoverable by Defendant or his counsel, a racially imbalanced venire was chosen in the first instance, one that failed even minimally to match the demographics of the community (5% Hispanic chosen versus 13.9 to 20.4% Hispanic population). Then the prosecution eliminated the only Hispanic veniremen, Patsy Garcia and Cordelia Vasquez, through their peremptory challenges, leaving an all-Caucasian jury to judge Defendant, an Hispanic. Although ostensibly the prosecution could argue that the peremptory challenges were geared to the fact that both Hispanic veniremen knew the Defendant, the voir dire process revealed no prosecutorial attempt

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[12] See *Taylor vs. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) at 95 S.Ct. 697; ". . . [T]he selection of petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."

[13] *See Taylor vs. Louisiana*, footnote 12, above; *Castaneda vs. Partida*, 430 U.S. 460, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Duren vs. Missouri*, 439 U.S. 355, 94 S.Ct. 664, 58 L.Ed.2d 579 (1979).

[14] See *Batson vs. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[15] See *Duncan vs. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

to challenge either of them for cause and no indication that either of them would fail to adhere to the requirements placed on all jurors by the instructions.

C. Defendant is entitled to a jury of his peers. The U.S. Supreme Court has only addressed whether jury selection is improperly biased if persons are excluded from juries because of age, sex, and race. The Court has so far held that jury selection is discriminatory if potential veniremen are excluded because of sex,[16] and most significantly, that *racial balance is mandatory.*[17] Thus, Defendant was denied his Constitutional right to a fair trial by his peers.

SUMMARY

Defendant was denied a fair trial, because of both prosecutorial misconduct (failure to comply with proper discovery requests and failure to abide by the Court's Order in Limine) and jury racial imbalance. The only cures for denial of a fair trial are outright dismissal of the charges or a new trial, free from the same deficiencies. The Court is therefore urged to dismiss the charges, or to grant this Motion for New Trial.

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[16] See *Taylor vs. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Duren vs. Missouri,* 439 U.S. 355, 94 S.Ct. 664, 58 L.Ed.2d 579 (1979).

[17] See *Castaneda vs. Parrida,* 430 U.S. 460, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

/s/ Cary R. Alburn
Cary R. Alburn III
Attorney for Defendant
Alburn & Earnshaw, P.C.
P.O. Box 2244
Ft. Collins, CO 80522-2244
970 221-2266

CERTIFICATE OF SERVICE

I CERTIFY that I served the foregoing by mailing a copy thereof, postage prepaid, to the following address, this 1st day of November, 1996:

Ms. Joy McMurtry
Deputy County and Prosecuting Attorney
Carbon County Courthouse
Rawlins, WY 82301

/s/ Cary R. Alburn
of Alburn & Earnshaw, P.C.
P.O. Box 2244
Ft. Collins, CO 80522-2244

APPENDIX D

STATE OF WYOMING COUNTY OF CARSON	)) ss.)	
THE STATE OF WYOMING, Plaintiff, vs. MARIO ESPINOZA, Defendant.	))))))))	IN THE DISTRICT COURT SECOND JUDICIAL DISTRICT CRIMINAL DOCKET NO. 5137

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

(Filed Dec. 16, 1996)

THIS MATTER having come before the Court on December 6, 1996 upon the Defendant's Motion for a New Trial; the Defendant appearing personally and in person, Cary Alburn appearing as counsel for the Defendant, the State of Wyoming being represented by and through Joy H. McMurtry, Deputy County and Prosecuting Attorney; the Court having heard the arguments of the parties and being otherwise well advised in the premises;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for a New Trial be denied.

DATED this 16 day of December, 1996.

/s/ Ken Stebner
DISTRICT COURT JUDGE

cc: Carbon County Attorney's Office
Cary Alburn, Attorney for the Defendant
Mario Espinoza, c/o Cary Alburn

APPENDIX E

STATE OF WYOMING COUNTY OF CARBON	)))	ss.
THE STATE OF WYOMING Plaintiff, vs. MARIO ESPINOZA, Defendant.	))))))))	IN THE DISTRICT COURT SECOND JUDICIAL DISTRICT Criminal Docket No. 5137

TRAVERSE TO DEFENDANT'S MOTION FOR NEW TRIAL

(Filed Nov. 13, 1996)

COMES NOW, the State of Wyoming by and through Joy H. McMurtry, Deputy County and Prosecuting Attorney in and for Carbon County, and in opposition to the Defendant's Motion for New Trial states as follows:

1. The Defendant has not met the standards for a new trial. In *Warren v. State*, the Wyoming Supreme Court stated that "a motion for a new trial is in the sound discretion of the trial court and this court will not to reverse unless the appellant affirmatively demonstrates an abuse of discretion". 809 P.2d 788, 790 (Wyo. 1991). *See also, Relish v. State*, 860 P.2d 455, 458 (Wyo. 1993) and *Barnes v. State*, 858 P.2d 522, 536 (Wyo. 1993). "Abuse of discretion" is defined as:

> A court does not abuse its discretion unless it acts in a manner which exceeds the bounds of

> reason under the circumstances. In determining whether there has been an abuse of discretion, the ultimate issue is whether or not the court could reasonable [sic] conclude as it did. An abuse of discretion has been said to mean an error of law committed by the court under the circumstances.

Martinez v. State, 611 P.2d 831, 838 (Wyo. 1980). *See also, Martin v. State*, 720 P.2d 894, 896 (Wyo. 1986). As there was no abuse of discretion, the appropriate cause of action for the complaints set forth in the Defendant's motion would be an Appeal from the judgment of the jury.

2. The Defendant had full discovery pursuant to rule 16 of the Wyoming Rules of Criminal Procedure. All written and recorded statements were provided to the defense in a timely manner. The Defendant's voluntary statement to Kebin Haller on the night of his arrest was shared with the Defendant through the preliminary hearing held on June 10, 1996. Additionally, counsel for the defense had access to Kebin Haller for interview purposes and did in fact interview Mr. Haller on October 3, 1996. Therefore, there was no violation of the discovery rule. In addition, the Defendant does not allege any ruling of the court which amounts to abuse of discretion.

3. In the hearing on the Motion in Limine, the court warned defense counsel that testimony could be elicited regarding the Defendant's uncharged conduct if the defense "opened the door" during cross examination. In *Chavez-Becerra v. State*, the Wyoming Supreme Court noted that Wyoming follows the "open the door" rule. A defendant may "open the door" on cross-examination to

evidence of prior criminal conduct. When he raises a line of questions, the prosecutor is entitled to make a permissible inquiry without crossing into prosecutorial overkill. Slip Op. 95-247 at 8 (Wyo. April Term 1996).

During the Cross examination of Kebin Haller, defense counsel opened the door to uncharged conduct by asking Mr. Haller whether he confronted the Defendant in January. Defense counsel then attempted to provide an answer for Mr. Haller as to why he confronted the Defendant in January by stating "[a]nd basically you told him, clean up your act or I'm going to get you, right?" At this juncture, Mr. Haller provided an answer for the defense that did not reveal the uncharged conduct, as he had been appropriately instructed by counsel for the State as to the limitation placed on such evidence by court rulings.

During redirect, the State went through the defense's opened door and clarified why Mr. Haller confronted the Defendant. Such a clarification was necessary for the jury to hear the actual reason for the confrontation, rather than only hearing defense counsel's testimony as to his speculation about the confrontation. The State was clarifying testimony elicited by defense, which is permissible. *Id.* at 7. Therefore, there was no prosecutorial misconduct in eliciting this statement and, thus, no abuse of discretion by the court in denying the Defendant's Motion for Mistrial.

4. The defense counsel in *Lofton v. State*, articulated Mr. Alburn's argument regarding the composition of the jury panel. 489 P.2d 1169, 1172 (Wyo. 1971). The court

answered defense counsel's attack on the jury panel as follows:

> It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination . . . Thus, the defendant's premise is faulty and the charge without merit. Even so, the matter should not be passed without noting the unfortunate method by which the attack on the jury array was launched, without any information to the number of persons eligible for jury service and solely on the request for the court to take judicial notice of the census population . . .

Id. at 1172.

Mr. Alburn launched the very same attack as shown above. There is no showing as to the actual persons eligible for jury service. He also requests that the court take notice of a census poll that is not in evidence.

The court in *Boyd v. State* stated:

> [T]he simplest method by which any defendant could challenge a jury as being selected by systematic and intentional exclusion of any group of persons would be to present the names of various persons who were entitled to be on the jury list and whose names were not contained thereon.

528 P.2d 287, 290 (Wyo. 1974). Mr. Alburn presents no such evidence. The court further noted in *Simms v. State* that recognized challenges of the jury array have "stemmed from evidence of systematic and intentional exclusion of some group not merely from the fact that

there are numbers of a group in the community a lack of their members in the jury array." 492 P.2d 516, 520 (Wyo. 1972). The United States Supreme Court stated that a "mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination." *Fay v. New York*, 332 U.S. 261, 284 (1947). As "conjecture can have no part in such challenges and specific evidence, here lacking, is essential to establish a prima facie case of exclusion." *Simms*, 492 P.2d at 520. Therefore, Mr. Alburn's charge regarding the selection of the jury panel is without merit.

5. The jury panel for the Defendant did, in fact, contain two Hispanic individuals, identified by their surnames. Both jurors were preempted by the State. Both jurors identified a close relationship between their children and the Defendant. Both jurors noted that the Defendant had been in their homes on numerous occasions, *before and after* the charges were brought. One juror stated this to the State during voir dire, the other juror revealed this information to defense counsel during voir dire. In any event, no ruling of the court addressable by rule 33 of the Wyoming Rules of Criminal Procedure was ever made.

THEREFORE, for the reasons set for the in this traverse, the State respectfully requests that the Defendant's Motion for New Trial be denied and the State requests that Defendant's motion be denied without a hearing as none is required when the record is complete. *Best v. State*, 769 P.2d 385 (Wyo. 1989).

DATED this 13 day of November, 1996.

Respectfully submitted,

/s/ Joy H. McMurtry
Joy H. McMurtry, Deputy
Carbon County
and Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 13 [sic] November, 1996, I served a copy of the above Traverse to the Defendant's Motion for New Trial by mailing a true and correct copy thereof, by depositing the same in the United States mail, duly enveloped and postage prepaid, and addressed to:

Cary Alburn
Alburn and Earnshaw
P.O. Box 2244
Fort Collins, CO 82301

/s/ Joy H. McMurtry
Joy H. McMurtry

APPENDIX F

STATE OF WYOMING)		IN THE DISTRICT COURT
)	ss.	SECOND JUDICIAL
COUNTY OF CARBON)		DISTRICT
)		Criminal Action No. 5137

STATE OF WYOMING,)
Plaintiff,)
vs.)
MARIO ESPINOZA)
Defendant)

MOTION TO RECONSIDER DEFENDANT'S *MOTION FOR NEW TRIAL*

COMES NOW the Defendant, through counsel, and respectfully moves the Court to reconsider its decision, denying Defendant's *Motion for New Trial,* upon the grounds and for the reasons that this Court and Defendant's counsel were materially misled by inaccurate and *completely untrue statements of the assistant County Attorney,* relevant to whether in response to Defendant's counsel's timely request for any out of court statements of Defendant, she provided such "discovery", as follows:

> 1. The assistant County Attorney provided to Defendant's counsel as "discovery" two audio tapes, allegedly copies of the tapes of the preliminary hearing, by letter dated October 2, 1996, and a transcript of the audio tapes. The second tape provided to Defendant's counsel is blank, and the transcript states on the last page

thereof, **"TAPE TWO OF TWO INAUDIBLE".**[1] This tape will be provided to the Court upon the Court's request.

2. The assistant County Attorney stated in her *Traverse to Defendant's Motion for New Trial:* "The Defendant's voluntary statement to Kebin Haller on the night of his arrest was shared with the Defendant through the preliminary hearing held on June 10, 1996."[2]

3. Defendant's counsel recalls that the assistant County Attorney told this Court during the oral argument on the *Motion for New Trial,* held December 6, 1996,

a. That the second tape did not record,

b. That the County Court's recording equipment malfunctioned and has been since repaired,

c. That during Defendant's counsel's cross examination of Kebin Haller, Haller had disclosed Defendant's alleged voluntary statement occurring at the time of his arrest,

d. That if called again Haller would testify that he was asked about the arrest by Defendant's counsel during cross examination at the Preliminary Hearing and disclosed the alleged out of court statement, and

e. That "the Clerk" recalled such testimony and would so testify if called.

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[1] See page 17 of the transcript attached to *Defendant's Reply to Plaintiff's Traverse.*

[2] See paragraph 2 appearing on the first and second pages of the *Traverse to Defendant's Motion for New Trial.*

The assistant County Attorney's assertions were recorded by the official Court Reporter and should be part of the official transcript, at such time as it is prepared. We believe that the official transcript will bear out the recollections of Defendant's counsel.

4. The Clerk of the County Court is on vacation this date and was therefore not available to Defendant's counsel to confirm or deny the assistant County Attorney's assertions regarding what she may have heard during Haller's testimony. Deputy County Court Clerk Sherry Rodabaugh, however, has advised Defendant's counsel this date by telephone that to the best of her knowledge, there have been no malfunctions of the County Court recording equipment since this Court's letter in May 1996 (a month before the Preliminary Hearing) respecting a small claim matter (heard by the County Court the preceding October 1995) that apparently was not "listenable". She advised that the batteries in the recorder had needed replacing and were replaced, but to the best of her knowledge, at no time has the equipment needed repair, either before or after the date of the Preliminary Hearing.

5. In fact, the *original* second tape, which was forwarded to the District Court when Defendant was bound over is clearly audible!!!!! It is in the custody of the Clerk of the District Court and is available to the Court to hear. On this date, December 20, 1996, the Clerk of the District Court, Lindy Smith, played the *entire* second tape to Defendant's counsel over the telephone, and *the recording made over the telephone by Defendant's counsel from that tape is also clearly audible.*

It begins where the first tape leaves off and ends with the County Judge binding the Defendant over to the District Court, without any discernible gaps.

6. The clearly audible second tape discloses, as Defendant's counsel asserted in *Defendant's Reply to Plaintiff's Traverse* and again in oral argument upon the *Motion for New Trial*, " . . . the circumstances surrounding Defendant's arrest, including any alleged statement of any sort, were *never* the subject of any testimony or discussion during the preliminary hearing."

Argument:

This Court expressed, in ruling upon Defendant's *Motion for New Trial*, that it was most disturbing that nowhere in the District Court record was there any indication that the request by Defendant's counsel for any out of court statements of the Defendant had been honored by the assistant County Attorney. Defendant's counsel felt that it boiled down to a credibility issue, whether the Court should believe the assistant County Attorney or should believe Defendant's counsel. *We must urge this Court to listen to the second tape* (and the first, if the Court wishes). Thereafter, credibility of counsel will not be in doubt.

Once a material statement of a witness is shown to be willfully false, the fact finder is free to disregard the testimony except as it is corroborated by other good and credible evidence (Instruction 1.02, W.Cr.P.J.I.[3]).

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[3] See page 4 of Instruction No. 1.02, W.Cr.P.J.I.: "If you believe from the evidence in this case that any witness willfully

Shouldn't the assertions of a trial attorney be judged by the very same standard? The assistant County Attorney needed only to walk down the length of a hall to confirm whether the original second tape was defective. Apparently the assistant County Attorney did not do so. Instead, without apparently doing so, she provided to Defendant's counsel in inaudible copy of the second tape and a transcript that claims the second tape was "inaudible" – *when the original is audible!* Furthermore, she asserted *unequivocally* to the Court and counsel:

a. That the tape was defective *when it is not,*

b. That the recording equipment malfunctioned *when it did not,*

c. That "the Clerk" would confirm testimony *which she could not* (because the tape proves that it did not happen), and

d. That if the tape had not been defective it would reveal testimony *which it does not.*

There could not be less candor! Such assertions were either willfully false or woefully negligent.

We must therefore urge that the Court disregard each and every assertion made by the assistant County Attorney. She has told the Court that all "discovery" was provided, that she properly advised Haller not to testify about uncharged misconduct, and that there was a non-discriminatory reason for peremptorily challenging the

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and corruptly swore falsely to any material fact in this case, then you are at liberty to disregard all or any part of that testimony, except insofar as the same has been corroborated by other and credible evidence, and the facts and circumstances proven during the trial."

only two Hispanic jurors from the venire. *None of those assertions by the assistant County Attorney are corroborated.* Instead, the second tape, much like the infamous Nixon tapes, proves *beyond a shadow of a doubt* that each and every assertion that the assistant County Attorney provided "discovery" through the aegis of the Preliminary Hearing of the single most critical piece of evidence in the case, the alleged out of court statement of Defendant, are *completely* and *utterly* *untrue.* There was no such disclosure, not *then,* not *ever,* until the testimony was dropped like a bomb at trial during Kebin Haller's direct testimony.[4] *Every other assertion thus becomes suspect!*

How much more proof does this Court need, to find that Defendant's conviction was tainted by egregious prosecutorial misconduct? The fairest, the best resolution of this conundrum foisted upon the Court by the egregious misconduct of the assistant County Attorney is outright dismissal of the charges against the Defendant. But at the very least, a new trial is appropriate, one without the multiple problems already brought to the Court's attention in the *Motion to Dismiss* and *Defendant's Reply to Plaintiff's Traverse.*

/s/ Cary R. Alburn III
Cary R. Alburn III
Attorney for Defendant
Alburn & Earnshaw, P.C.
P.O. Box 2244
Ft. Collins, CO 80522-2244
970 221-2266

---

[4] See page four of the Partial Transcript prepared by the official Court Reporter, attached as Exhibit E to the *Motion for New Trial.*

CERTIFICATE OF SERVICE

I CERTIFY that I served the foregoing by mailing a copy thereof, postage prepaid, to the following address, this 20th day of December, 1996.

Ms. Joy McMurtry
Deputy County and Prosecuting Attorney
Carbon County Courthouse
Rawlins, WY 82301

/s/ Cary R. Alburn III
of Alburn & Earnshaw, P.C.
P.O. Box 2244
Ft. Collins, CO 80522-2244

APPENDIX G

STATE OF WYOMING COUNTY OF CARBON	)))	ss.
STATE OF WYOMING Plaintiff, vs. MARIO ESPINOZA, Defendant.	)))))))	IN THE DISTRICT COURT SECOND JUDICIAL DISTRICT CRIMINAL NO. 5137

TRAVERSE TO DEFENDANT'S MOTION TO RECONSIDER MOTION FOR NEW TRIAL

(Filed Jan. 7, 1997)

COMES NOW the State of Wyoming by and through Joy H. McMurtry, Deputy County and Prosecuting Attorney, and in opposition to the Defendant's Motion to Reconsideration states as follows:

AUDIBILITY OF THE PRELIMINARY HEARING TAPE

1. The two (2) original tapes from the preliminary hearing in County Court were duplicated on the County Attorney Office duplicating machine. While the tapes were being transcribed at a later date, it was noted that tape two (2) was inaudible. The Defense received a copy of tape two (2) from the County Attorney office duplicating machine and that tape was also inaudible.

The State assumed that the original tape two (2) was inaudible. Neither the State nor the Defense listened to

the original recordings. It is now clear that the inaudibility of tape two (2) was due to a problem in it's [sic] duplication. This failure by the duplication was an unknown and unintentional problem. Therefore, the State did not intentionally mislead the Defense concerning inaudibility of tape two (2).

DEFENDANT'S STATEMENT REGARDING THE FILED INFORMATION AND AFFIDAVIT

2. After reviewing the tapes, it is clear that Kebin Haller, the witness for the State, was not questioned at the Preliminary Hearing regarding the arrest of Mario Espinoza and Mario Espinoza's statement that the Information and Affidavit were "mostly true" was not illicited. It was the good faith belief and memory of the Deputy County Attorney and Officer Kebin Haller that this statement had been revealed to the Defense counsel at the Preliminary Hearing. Therefore this was not an intentional failure to provide discovery pursuant to the Wyoming Rules of Criminal Procedure. However, if it is considered error, it would be harmless error as the evidence against Mario Espinoza was overwhelming regardless of the introduction of his statement "mostly true". In addition, counsel for the Defendant had access to all reports and notes of Kebin Haller and in fact interviewed him by telephone on at least one (1) occasion and did not inquire about his client's arrest or statements.

Therefore, for the reasons set forth in this traverse, the State respectfully requests that the Defendant's Motion for Reconsideration of the Defendant's Motion for

New Trial be denied and for such other and further relief as the Court deems appropriate in the circumstances.

Dated this 7th day of January, 1997.

Respectfully submitted,

/s/ Joy H. McMurtry
Joy H. McMurtry, Deputy
Carbon County
and Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 1997, I served a copy of the above Traverse to the Defendant's Motion to Reconsider Defendant's Motion for New Trial by mailing a true and correct copy thereof, by depositing the same in the United States mail, duly enveloped and postage prepaid, and addressed to:

Cary Alburn
Alburn and Earnshaw
P.O. Box 2244
Fort Collins, CO 80522-2244

/s/ Joy H. McMurtry
Joy H. McMurtry

APPENDIX H

IN THE SUPREME COURT, STATE OF WYOMING

MARIO ESPINOZA, Appellant (Defendant)	)	No. 97-69
vs.	)	
STATE OF WYOMING, Appellee (Plaintiff).	)	

BRIEF OF APPELLANT MARIO ESPINOZA

(Filed Apr. 1, 1997)

Cary R. Alburn III
Attorney for Appellant
Alburn & Earnshaw, P.C.
P.O. Box 2244
Ft. Collins, CO 80522-2244
970 221-2266

STATEMENT OF THE ISSUES

I. There was serious prosecutorial misconduct which denied Appellant a fair trial, because the Assistant County Attorney failed to honor Appellant's reasonable and timely discovery request for any out of court statements made by Appellant, but during trial used an undisclosed out of court statement allegedly made by Appellant (his alleged response, "mostly true", to the arresting officer's question whether the charging documents were true or false).

II. Appellant's alleged out of court statement (his alleged response, "mostly true", to the arresting officer's question whether the charging documents were true or false) was obtained without the required advisement of rights, which denied Appellant a fair trial.

III. The District Court erred by permitting evidence of Appellant's alleged out of court statement (his alleged response, "mostly true", to the arresting officer's question whether the charging documents were true or false) to go to the jury, without a proper showing of the required advisement of rights, which denied Appellant a fair trial.

IV. The District Court erred by permitting argument regarding the admissibility of Appellant's alleged out of court statement (his alleged response, "mostly true", to the arresting officer's question whether the charging documents were true or false) to be presented in front of the jury, in violation of Wyoming law, which denied Appellant a fair trial.

V. There was serious prosecutorial misconduct, because the Assistant County Attorney presented hearsay evidence of prior uncharged misconduct in violation of the notice requirements of Wyoming law and in violation of the District Court's *Order in Limine*, which denied Appellant a fair trial.

VI. The District Judge erred by denying Appellant's oral *Motion for Mistrial*, which was based upon the Prosecution's violation of the notice requirements of Wyoming law and the *Order in Limine* respecting evidence of prior uncharged misconduct, which denied Appellant the opportunity for a fair trial.

VII. The jury was selected in an inherently unlawful discriminatory manner, because the venire was not a representative cross section of the community, as required by the Constitution of the United States as interpreted by the United States Supreme Court, which denied Appellant a fair trial.

VIII. The prosecution improperly removed the only two Hispanic veniremen by peremptory challenges without articulating a clear, non-discriminatory reason for doing so, as required by the Constitution of the United States as interpreted by the United States Supreme Court, which denied Appellant a fair trial.

IX. The District Judge erred by denying Appellant's *Motion for New Trial*, which was based upon the prosecution's improper suppression of evidence during discovery, the prosecution's improper presentation of hearsay evidence of prior uncharged misconduct in violation of the notice requirements of Wyoming law and of the District Court's *Order in Limine*, and the discriminatory jury selection, which denied Appellant the opportunity for a fair trial.

X. There was egregious prosecutorial misconduct, because the Assistant County Attorney falsely claimed to the District Judge, both in writing and orally, that Appellant's counsel had been informed about the alleged out of court statement of Appellant during the Preliminary Hearing but that there was no tape recording of that disclosure due to an equipment malfunction, which denied Appellant the opportunity for a fair trial.

XI. The District Court erred by summarily denying Appellant's *Motion for Reconsideration of Motion for New*

Trial, which was based upon the prosecutorial misconduct of the Assistant County Attorney claiming that Appellant's counsel had been informed about the alleged out of court statement of Appellant during the Preliminary Hearing but that there was no tape recording of that disclosure due to an equipment malfunction, which denied Appellant the opportunity for a fair trial.

ARGUMENT

I. Summary

We have raised 11 separately articulated Issues in the *Statement of the Issues*. These can be compartmentalized into three (3) principal areas, which necessarily overlap (to the extent that there is overlap, some of the discussion hereafter will seem repetitive):

1. **Prosecutorial misconduct**, consisting of:

   Issue I, failing to honor discovery requests for out of court statements of Appellant;

   Issue V, presenting hearsay evidence of prior uncharged misconduct in violation of notice requirements and the *Order in Limine*;

   Issue VIII, improperly exercising peremptory challenges of the only two Hispanic veniremen without articulating a clear, nondiscriminatory reason for the challenges; and

   Issue X, falsely claiming that Appellant's counsel had been informed about Appellant's alleged out of court statement during the Preliminary Hearing but that there was no tape recording of that disclosure due to an equipment malfunction.

2. **Judicial Errors**, consisting of:

Issue III, admitting the alleged out of court statement of Appellant without proper showing of advisement of rights;

Issue IV, permitting argument to be made regarding the admissibility of Appellant's alleged out of court statement in front of the jury;

Issue VI, denying Appellant's *Motion for Mistrial* made orally during trial based upon the prosecution's violation of the notice requirements and the *Order In Limine;*

Issue IX, denying Appellant's *Motion for New Trial* based upon Issues I, V, VII, and VIII; and

Issue XI, denying Appellant's *Motion to Reconsider the Motion for New Trial,* which was based upon the prosecution's intentional misleading of the Court and Appellant's counsel as described in Issue X.

3. **Constitutional Issues**, consisting of:

Issue II, obtaining the alleged out of court statement of Appellant without proper advisement of rights;

Issue III, admitting the alleged out of court statement of Appellant without proper showing of advisement of rights;

Issue VII, unlawful discriminatory jury venire selection; and

Issue VIII, improper peremptory challenges of the only two Hispanic veniremen without a clearly articulated nondiscriminatory reason for the challenges.

II. Prosecutorial misconduct.

A. Discovery suppression.

Issue I, failing to honor discovery requests for statements of Appellant; and

Issue X, falsely claiming that Appellant's counsel had been informed about Appellant's alleged out of court statement during the Preliminary Hearing but that there was no tape recording of that disclosure due to an equipment malfunction.

Appellant is entitled to a jury of his peers. The U.S. Supreme Court has only addressed whether jury selection is improperly biased if persons are excluded from juries because of age, sex, and race. The Court has so far held that jury selection is discriminatory if potential veniremen are excluded because of sex,[59] and most significantly, that ***racial balance is mandatory***[60]. Because this uncompromising mandate was ignored in this case, Appellant was denied his Constitutional right to a fair trial by his peers.

V. Closing Summary.

Rarely is there a case in which so many significant problems existed, as we have outlined in this case, although the facts here were relatively simple. But we have raised

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[59] See *Taylor vs. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Duren vs. Missouri*, 439 U.S. 355, 94 S.Ct. 664, 58 L.Ed.2d 579 (1979).

[60] See *Casteneda vs. Partida*, 430 U.S. 460, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

11 separately articulated Issues, compartmentalized into three (3) principal areas, with some necessary overlaps. We have discussed:

1. **Prosecutorial misconduct**, consisting of: failing to honor discovery requests for out of court statements of Appellant; presenting hearsay evidence of prior uncharged misconduct in violation of notice requirements and the *Order in Limine;* improperly exercising peremptory challenges of the only two Hispanic veniremen without articulating a clear, nondiscriminatory reason for the challenges; and most egregious of all, falsely claiming that Appellant's counsel had been informed about Appellant's alleged out of court statement during the Preliminary Hearing but that there was no tape recording of that disclosure due to an equipment malfunction.

2. **Judicial Errors**, consisting of: admitting the alleged out of court statement of Appellant without proper showing of advisement of rights; permitting argument to be made regarding the admissibility of Appellant's alleged out of court statement in front of the jury; denying Appellant's *Motion for Mistrial* made orally during trial based upon the prosecution's violation of the notice requirements and the *Order in Limine;* denying Appellant's *Motion for New Trial* based upon Issues I, V, VII, and VIII; and summarily denying Appellant's *Motion to Reconsider the Motion for New Trial,* which was based upon the prosecution's intentional misleading of the Court and Appellant's counsel as described in Issue X.

3. **Constitutional Issues**, consisting of: obtaining the alleged out of court statement of Appellant without proper advisement of rights; admitting the alleged out of court statement of Appellant

without proper showing of advisement of rights; unlawful discriminatory jury venire selection; and improper peremptory challenges of the only two Hispanic veniremen without a clearly articulated nondiscriminatory reason for the challenges.

Each described event before, during, and after trial *by itself* denied Appellant a fair trial or the opportunity for a fair trial. **All of these problems therefore demand reversal of Appellant's conviction.** Appellant is entitled to a fair trial, one in which the prosecution properly discloses its evidence in response to discovery requests, one in which only properly admissible evidence comes to the attention of the jury, one in which his Constitutional rights are properly preserved. The only possible way that can occur is for this case to be reversed and remanded for a new trial, with specific instructions to guide the District Court and the prosecutor. We ask this Honorable Court to do just that.

Respectfully submitted,

_____

Cary R. Alburn III
Attorney for Appellant

CONCLUSION

Appellant is entitled to a fair trail, one in which the prosecution properly discloses its evidence in response to discovery requests, one in which only properly admissible evidence comes to the attention of the jury, one in which his Constitutional rights are properly preserved. The only possible way that can occur is for this case to be reversed and remanded for a new trial, with specific instructions to guide the district Court and the prosecutor. We therefore ask this Honorable Court to reverse

Appellant's conviction and to remand to the District Court for a new trial, with instructions.

Respectfully submitted,

/s/ Cary R. Alburn
Cary R. Alburn III
Attorney for Appellant

APPENDIX I

STATE OF WYOMING)
ss.
COUNTY OF CARBON)

STATE OF WYOMING IN THE DISTRICT COURT

COUNTY OF CARBON SECOND JUDICIAL DISTRICT

State of Wyoming,
Plaintiff,

-vs-

Mario Espinoza,
Defendant.

Criminal Docket No. 5137

Motion for New Trial Hearing

TRANSCRIPT OF PROCEEDINGS

(Filed Feb. 26, 1997)

The above-entitled cause came on for hearing at the hour of 1:33 o'clock p.m. on the 6th day of December, 1996, before the Honorable Kenneth E. Stebner, District Court Judge, at the Carbon County Courthouse.

APPEARANCES:

For the State

Joy H. McMurtry
Deputy Prosecuting Attorney
Carbon County Courthouse
Rawlins, WY 82301

For the Defendant — Cary R. Alburn, III
Alburn & Earnshaw, P.C.
19 Old Town Square
Fort Collins, CO 80522

WHEREUPON, the following proceedings were then had:

* * *

[p. 4] excellent.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria. It means a sound judgment exercised with regard to what is right under the circumstances, and without doing so arbitrarily or capriciously, and then we ask the Court to do exactly what that concept of sound discretion means.

We have three prongs to this motion for new trial. Two of them have to do with prosecutorial misconduct. One of them involves pretrial prosecutorial misconduct. The improper suppression of evidence.

Your Honor, it has been suggested that we were somehow provided with the knowledge that Kebin Haller was going to testify about an out of court statement made by the Defendant at the time of his arrest.

We were not provided with that information at all, ever. And we provided to the Court, in our reply to the traverse, the transcript that was prepared from the tape from the first tape of the Preliminary Hearing. The second tape, apparently, did not record, but nowhere within that can we find anything at all suggesting that there was any information about the arrest.

The only information about the arrest took place not at the pretrial, but – or rather at the Preliminary [p. 5] Hearing, I mean, but, in fact, at the first appearance when the Assistant Prosecutor gratuitously provided some information that turned out to be erroneous anyway, and nonetheless, there was no suggestion. And incidentally, I was not there at that first appearance at all. The Defendant appeared there without counsel.

But there is no suggestion at all that any statement was made at any time.

Now, this is a double problem for us. First, we were not told about it. But secondly, when it came forward during the trial, that violated the Wyoming Supreme Court's expression of when such matters should be argued, and that is they should be argued in a pretrial setting out of the hearing, out, not even involved in the Court.

Had we known about it, we would have done exactly that. We would have filed a motion to suppress that specific statement and we would have had that hearing that the White case, a 1995 Wyoming case says must be held outside the hearing of the Court.

If you're not told about it, you certainly can't make the motion. And nowhere were we ever told that that statement was going to be made. And we specifically asked for any, any statement, not just written, not just recorded, but any statement. And we [p. 6] were never told.

We've provided the Court with all the responses that we can, other than a transcript of the hearing that we had

in September over this issue of discovery. And at that time, the Court undoubtedly will recall that the Prosecutor said, we've provided everything that we have except this one tape, and we will provide everything that comes up. Or words to that effect. And we believed that and we sincerely believed that. We went into trial and we found we weren't provided with it.

Now, that's the first part of the prosecutorial misconduct, improper suppression of evidence that we had specifically requested in which the law says we must be provided with.

Then the second part is the violation of the order in limine. And in this particular case, Your Honor, we argued this in the form of a request to the Court for a mistrial during the trial. But at that time, we were not aware of the exhortations of the Wyoming Supreme Court in the very recent case, if I can pronounce it correctly, I'm not sure that I can, cited by the Assistant Prosecutor as a slip sheet case, but which has just recently come out in the advanced sheets, Chavez-Becerra v. State.

That case suggests or it states that Wyoming does

* * *

[p. 8] of the position of the Wyoming Supreme Court in the Chavez-Becerra case.

The third area is one in which we do not have very many times to discuss in the State of Wyoming. But as the Court knows, we address the issue of discrimination in great detail during our Voir Dire of the jury. And I expect none of us in this courtroom were as aware as we should have been of what the law is and what the law must be

today in the State of Wyoming as it is in the United States, all over the United States.

You know, as I drove up here this morning, I was struck once again by that ridiculous sign that the State of Wyoming places at the border, and it says, Wyoming, like no place on earth.

Well now, it is like some place else on earth. It is a part of the United States and the United States Supreme Court has made it clear, very clear, I think in the Taylor case, which we have not only cited, but which we found upon further reflection and further investigation, has been specifically restated again in the Powers case, the 1991 case which essentially says the selection of a petit jury from a representative cross section of the community is an essential component of the 6th Amendment right to a jury trial.

All these cases that occurred in Wyoming before the [p. 9] Taylor case in 1975, all of them placed an extraordinary burden upon the Defense to show some kind of invidious discrimination. That is not the law today.

The law today is as expressed in Taylor v. Louisiana, and in Powers v. Ohio, and that places the burden not on the Defendant to show discrimination, but simply the fact of there being discrimination.

And that's what we had in this case, Your Honor. We've got a 40 venire man jury panel. Two of those 40, only five percent are Hispanic. That in and of itself violates Taylor. And pretty clearly as Mr. Justice Powell said, then the Prosecution went even too far and removed only,

removed those two people, the only ones who were Hispanic, and Justice Powell said the Prosecutor – well, quote, "nor may the Prosecutor rebut the Defendant's case merely by denying that he had a discriminatory motive" and further on the following page said "the Prosecutor must articulate a neutral explanation represented to the particular case to be tried", and all we have heard and all we can hear is that their responses in some fashion said that they knew the Defendant, and that he had been in their homes, apparently. I don't recall that particular statement, but it may have occurred.

Assuming it did, that does not disqualify these [p. 10] people for if they had been disqualified for cause, they should have been challenged for cause. Instead, all you have to do is take a look at the numbering of the challenges. The very first person off is Hispanic.

Now, pretty clearly the law as expressed by the United States Supreme Court is A, you can't have a discriminatory venire panel, and B, you can't remove those people who are of an ethnic minority without a pretty good justifiable reason that has nothing to do with their ethnic origin.

And the point here, Your Honor, is that we ended up with a jury that by law is unfair. No matter how wonderful those people actually are as individuals or perhaps as a group, the law is clear. Mr. Espinoza is part of the so called protected ethnic minority. The largest ethnic minority in Carbon County, the ethnic minority in the City of Rawlins, and he was entitled to a jury that was composed of a representative cross section of the community.

Now, the Court indicated you've read our submissions. I would invite you to read the Supreme Court decisions. Clearly, once one reads those, you cannot simply have a token ethnic representative and satisfy this requirement to have a representative cross section of the community.

[p. 11] When we're talking about a 20 some percent or a 13 some percent, we've got to have that many on the venire panel. We've got to have the burden from there. Then we have a very strong burden that shifts to the Prosecution to say, this is why I bumped these particular people to the point where that if you read the dissents of these Supreme court cases, you see what the Justice is saying, but this is going to destroy our jury system because we won't be able to use the peremptory challenges the way we've been doing it in the past.

And to that, Justice Powell says, no, we won't destroy it, but yes, you won't be able to do it the way you do it in the past because now you've got to articulate why you did it, if there is any indication of some kind of ethnic discrimination.

The cases, Your Honor, fall into three categories: gender, age, and ethnicity. So far, age has not been one that the Supreme Court has felt a necessity to leap onto. They have leapt all the way onto ethnicity and gender.

As a matter of fact, the Taylor case is a gender case. I did find one recent case. I'm sorry I did not bring the citation, which showed me the direction the United States Supreme Court will continue to go. The [p. 12] very recent case, I think '93-94, it's not a criminal case, surprisingly enough. It is a case involving when the State

brings a child support action against an individual, and in that particular case, the State's attorney acting in basically a civil case, but still it's the State doing it, bumped eight men off of the jury leaving a jury entirely composed of women.

And in that case, once again, the United States Supreme Court said, you can't do this. Because he articulated the reason was that he felt, well, men would tend to be a little bit more supportive of a man who had to pay child support. And they said, that's not good enough. You can't do it. You cannot discriminate against an individual because of gender or because of their ethnic background. That is the law in the United States.

The hallmark of our system is the Constitution of the United States that we must follow. You and I must follow it in Rawlins, Wyoming. The Wyoming Supreme Court must follow it in Cheyenne. That is the law throughout. This is not one of those situations where we can say, well, you know, we did okay.

We didn't do okay, Your Honor. We didn't. The law says, as a matter of law, that we discriminated against Mario Espinoza in the formation of this jury.

[p. 13] To summarize, Your Honor, we have three very good reasons why there must be a new trial. We have incredibly important evidence that was never provided to us before trial. We know it was incredibly important because that was one of the questions that the jury came back to us and said, Judge Stebner, can we see what it was that he said mostly true to.

That meant to all of us, that that was an extraordinarily important event during that trial. They hung on that event. Had they not heard that event, that is significant enough that we suggest to you that results could have been entirely different.

So we had not just a little bit of suppression of evidence, but a very important suppression of evidence. And then we had Kebin Haller violate the motion in limine either because he wasn't instructed correctly or because he was instructed to do it that way. I don't know. But it happened. It violated the motion in limine. It violated the Wyoming Supreme Court's most recent expression of the law, in the Chavez-Becerra case.

And lastly, we have a jury that, by law, is discriminatory because it does not represent a cross section of this community.

And we have provided the Court with the best [p. 14] evidence we can of what the cross section of this community is. The Court certainly can take judicial notice of that information. The Court, in just walking through downtown Rawlins, can take judicial notice that the Hispanic population is quite large. Certainly much larger than five percent, and we submit that we provided the very best evidence available to you of the size of the Hispanic population in this county and in this city.

On that basis, Your Honor, we ask that you grant the motion for new trial. We consider this extraordinarily important. I know that Court said we could address these issues over the telephone. We felt that it was important enough that we appear here today because this is not a pro forma motion. This is not something that you just

whip together. This is the law and we ask that the Court do what the Martin case says that you must do in exercising judicial discretion, use your sound judgment, exercise with regard to what is right under the circumstances.

We ask that in doing that, that you grant the motion for new trial.

THE COURT: Thank you. Ms. McMurtry?

MS. MCMURTRY: Thank you, Your Honor. May it please the Court.

THE COURT: Counsel.

[p. 15] MS. MCMURTRY: Counsel.

MR. ALBURN: Counsel.

MS. MCMURTRY: Your Honor, I'll be brief. I think we stated exactly what we needed to say in our traverse. I just wanted to respond briefly to Mr. Alburn's arguments.

Initially, the State feels and intends that Mr. Alburn has not met the standards for a new trial as outlined in Rule 33. There has been no abusive discretion alleged by the Trial Court for a new trial motion, and the appropriate action, we feel, would be an appeal for all the things that Mr. Alburn is alleging went wrong with this trial.

So we believe this is not an appropriate motion in front of the Court at this time; however, I would like to respond to his specific allegations.

I've already alleged that we have provided him with full discovery as required by Rule 16. I spoke at length with Officer Haller and the other people in the courtroom

the day during the Preliminary Hearing. Unfortunately, the second tape was not transcribable and was illegible. I believe Officer Haller specifically remembers discussing the arrest and specifically remembers testifying as to what Mario Espinoza said on the day that he was arrested, that that document was [p. 16] mostly true. And I apologize to the Court that I can't provide you with any documentation of that except for what Officer Haller has said.

THE COURT: Wait a minute. Would you just – Where did that come from?

MS. MCMURTRY: It was in the Preliminary Hearing, Your Honor, during the Preliminary Hearing when Mr. Alburn was cross-examining Kebin Haller. They discussed what happened at the time of the arrest.

THE COURT: Isn't there a transcript of that Preliminary Hearing?

MS. MCMURTRY: Your Honor, what they have is tapes, and the tape didn't work out. One of the tapes was fine. The second tape is not fine. And you can't hear it.

And I did provide that in discovery, but you can't hear anything on the tape. So I don't have any evidence besides what the Officer has said, what I recall from the trial, what the Clerk recalls from the trial, and that's all we know. That Kebin Haller did discuss that at the Preliminary Hearing, and we knew that Mr. Alburn had heard that before.

So we didn't provide him with any further statements of that because he had already heard that particular statement. So we believe that discovery was [p. 17] complete and to this day, I believe that he heard that statement prior to trial.

Additionally, Your Honor, when Kebin Haller started answering that question, that there was no objection by Defense Attorney in regards to it before he responded to that question. And he could have made a timely objection and then perhaps Kebin Haller wouldn't have answered the question. And then that would never have been in front of the jury, perhaps, but that was not done either.

Your Honor, regarding the information elicited from Kebin Haller on redirect after Counsel opened the door for the State to ask him, our contention in the traverse was that Mr. Alburn had asked a question and then provided Kebin Haller with an answer for what he did when he approached Mario Espinoza in January of 1996, contention we, the State, specifically did not ask him anything about that conduct on January – in January of 1996, because we told Kebin he couldn't discuss that. I told him specifically before trial, don't say anything about anything except for the two incidents for which Mario was charged. Don't talk about the conduct in January. Don't talk about anything afterwards unless I specifically ask you. And that was our cue that if the door wasn't opened, Kebin couldn't say anything.

* * *

[p. 19] of the jury unless Defense Counsel opened the door, which he did.

So there was no abusive discretion there, Your Honor, and there's no reason to grant a motion for new trial on that particular assertion.

The jury panel is another matter, Your Honor, and it's an interesting argument by Mr. Alburn by no stretch of the imagination; however, the problem initially, his first problem is that he tells you about a 1990 census. Well, when you're going to fight about the jury panel, you have to talk about how many people in the community are available and should be for jury service.

Now, perhaps the percentage of people that are in the community aren't all available for jury service. Perhaps only 10 percent of the white population and "X" percent of whatever population, we don't have that information. We don't know how many Hispanics are eligible for jury service. And whether it's the entire population of Carbon County or not, has not been in front of this Court.

Mr. Alburn presents no evidence of a systematic intentional exclusion of any group within Carbon County. He just talks about the 1990 census. He doesn't assert that there were "X" number of people from the Hispanic community who should have been on the jury panel and [p. 20] that's what his – that's what's required by law.

And also, Your Honor, Defense Counsel had, in his possession, the jury list somewhat prior to trial as did the State. He made no objection to the makeup of the jury panel at that time. He made no statement as to this allegation that there weren't enough of the representative population in Carbon County on the jury panel.

This is also nothing that should grant a new trial for, Your Honor. This is something that he should bring up at prior to trial, and if he believes that this is something that should be appealed, and that would be fine. He could certainly make that allegation in his appeal.

Your Honor, the Defense Counsel here is just making conjecture. He hasn't specifically stated any kind of thing that the State did to exclude a particular group. The two jury members in question knew the Defendant, stated that their children were good friends with the Defendant, he had been in and out of their homes before, during and after the charges were brought.

Your Honor, I wouldn't care of what their racial makeup was. If they had that kind of contact with the Defendant, regardless of the Defendant's racial makeup, I wouldn't keep then on my jury panel because you're [p. 21] just asking for trouble. And I believe Defense Counsel, if every person there was a cop, would have a fit too.

You don't want a certain group of people on your jury panel, and it doesn't matter about race, but contact and knowledge of the Defendant is extremely important because the State would be asking for trouble because you would certainly lose a case if every member on the jury panel were good friends with the Defendant or their children.

Your Honor, and we didn't remove these jurors for cause because there was no reason. But that's the heart of the selection system. We get to pick a certain number of people that we want to take off of the jury panel and that's what we did. And that's the whole reason for Voir

Dire, and that's the whole reason you get to select your jury.

Your Honor, we just ask that you look this over, and find that there was no abusive discretion. That this is an improper motion in front of the trial, excuse me, in front of Your Honor, and that Mr. Alburn's proper motion or proper procedure would be to appeal the judgment of the jury or the verdict of the guilty – the guilty verdict of the jury, and that we ask that you deny his motion at this time.

Thank you.

[p. 22] THE COURT: Thank you. Let me just ask again, regarding the first issue regarding the mostly true statement by the police officer –

MS. MCMURTRY: Uh-huh.

THE COURT: That was nowhere in any written discovery or recorded discovery that –

MS. MCMURTRY: No, Your Honor.

THE COURT: – that you have, that was provided to the Defendant.

MS. MCMURTRY: No, it wasn't in any of the officer's notes. It wasn't in the report of the Officer. It was only it came through testimony at the Preliminary Hearing, and that testimony was elicited by Mr. Alburn.

THE COURT: And we don't have that. That was elicited by Mr. Alburn?

MS. MCMURTRY: Yes, it was, Your Honor.

THE COURT: How was that – how did that happen?

MS. MCMURTRY: What the Officer remembers is Mr. Alburn asking him about the arrest and his response and what Mario said after Kebin Haller talked to him after he read his Miranda –

THE COURT: And then when it came out at trial, that was from a question by yourself?

[p. 23] MS. MCMURTRY: Yes, it was, Your Honor.

THE COURT: Is that correct?

MS. MCMURTRY: I don't have that portion of the transcript, Your Honor, here with me.

THE COURT: But we don't have the transcript of the Preliminary Hearing?

MS. MCMURTRY: No, Your Honor. There were two tapes. One of the tapes was fine and was transcribable. The second tape, you couldn't hear anything. And they did have a problem with their tape machine and they did apparently get it fixed. But that's one of the problems being down in county Court, they don't have a court reporter and you only have the tape machines and sometimes they don't work.

THE COURT: All right. Mr. Alburn, any follow-up comments?

MR. ALBURN: Yes, Your Honor. One of the purposes of a motion for new trial is to avoid the extraordinary expense to the Court, the system, and to the Defendant of doing an unnecessary appeal.

Apparently, Counsel is not aware of how much effort goes into an appeal or how much cost is involved, especially if that appeal results in a case being overturned and being sent for a new trial. Anyway, that is a total waste.

* * *

[p. 25] wide open when it's only been unlatched. That violates Wyoming law.

With regard to the jury again, Your Honor, the point is, it's the fact of not being a representative cross section of the community that is important. It is the fact of having removed these people who were the only people from that part of the community without a good reason, without an articulable reason. They were not challenged for cause. And they were not challenged peremptorily for a proper reason that's been articulated to this Court and the law says it must be articulated to this Court in order for that to be proper.

But first, you have to start with a proper venire. And here, we didn't. By law, according to Taylor, according to Powers, we did not have a proper venire.

Now, are we saying as we often do in Wyoming, outside the law, why, we've always done it this way. Your Honor, we can't always do it this way. What we've done is show to you that since 1975, the picking of juries in Rawlins, Wyoming is not as good as it must be in order to meet the standards of the United States Supreme Court. And those standard say you've got to have a representative cross section of the community and that's defined in the Taylor case and in the subsequent cases as you must

have at least the same percentage of [p. 26] the ethnic minority as exists in the community.

And we didn't do it. We the system didn't do it. We must correct it. Because I'll tell you, Your Honor, if we don't correct it, somebody upstairs is going to. The Wyoming supreme court is either going to correct it for us here in Carbon County, or the United States Supreme Court is going to correct it for the State of Wyoming. And by the time we get around to this four or five years from now, we're going to have a new trial. And that is an incredible waste of assets, an incredible waste of time, an incredible waste, period.

The time is now to grant a new trial.

THE COURT: Let me just ask some questions about your first ground.

MR. ALBURN: Yes, Your Honor.

THE COURT: I presume somebody's looked at the transcript on the Officer's statement about mostly true?

MR. ALBURN: Yes, Your Honor.

THE COURT: The improper suppression of evidence. It seems to me that when that happened, I don't recall specifically, but that the Officer was on direct examination, correct?

MR. ALBURN: Yes.

THE COURT: And made the statement. Did you object at the time?

[p. 27] MR. ALBURN: I objected on the grounds of a failure to comply with Miranda. And quite honestly, Your Honor, it frankly did not occur to me at that moment to object on the further grounds that that was information not provided to us in the course of discovery.

As you know, in the heat of trial, we don't always do the very smartest things. But I did object on the basis of Miranda. The Court, after we had some argument about Miranda, denied my objection. So –

THE COURT: Then on cross-examination, I seem to recall that you questioned the officer regarding his giving the Miranda.

MR. ALBURN: That's right.

THE COURT: It centered around more that he didn't go further and say, do you want an attorney. He just simply read the –

MR. ALBURN: My position, and it still remains that, Your Honor, is that the Miranda rights were not properly given and there was not therefore, assuming for the sake of argument, right this moment –

THE COURT: But that's not your basis for this?

MR. ALBURN: That's not my basis here, but the position I was taking and I would still take is that the [p. 28] advisement was defective. And consequently, if, in fact, that statement was made, which we say it was not, but if it was made, it was made not on the basis of any voluntariness as defined in Miranda. Our position, of course, is that it was not made. And the only time we ever heard that it was made was here in trial.

THE COURT: Well, do you agree –

MR. ALBURN: I can't argue with what Counsel says supposedly happened on the second tape. I saw, as I looked through the transcript and listened to the first tape of the Preliminary Hearing, a theme on my cross-examination of discussing only the events of the charges. I don't see anything leading up to an arrest issue at all.

I look at the direct examination and I recall specifically having my feet kept to the fire by the County Judge that I could not get beyond the bounds of direct examination. I look all through the Prosecutor's direct examination and I see absolutely nothing about the arrest.

My recollection is that I couldn't get beyond direct examination. My recollection is we never got into the arrest at all, ever.

I can't prove that. It's proving a negative. I don't have a tape. I don't have a transcript. I don't [p. 29] think it happened. I don't have it in my notes. I'll be glad to provide my notes to the Court, if you'd like them.

THE COURT: Well, it's either there or it isn't, I guess. What I want to make clear is that the first time that this Court was made aware of problems in discovery with regard to that statement is a result of this motion. It wasn't raised at trial.

Is that –

MR. ALBURN: That's correct, Your Honor. I did not raise it as part of my objection to this, the statement.

THE COURT: I'm just trying to remember what occurred at trial. I just don't remember anything that happened at trial regarding the issue in your first –

MR. ALBURN: No, and that's absolutely correct. I did not raise that as part of the objection to the Agent's statement and that –

THE COURT: Okay.

MR. ALBURN: I think it shows in the partial transcript that we attached. It pretty much follows exactly what I did do.

THE COURT: All right. Thank you. Anything further, Ms. McMurtry?

MS. MCMURTRY: Your Honor, I just want to [p. 30] clarify what Mr. Alburn said. When that testimony was elicited at the trial, "After you read the Miranda rights, and what did you ask him?" "I asked him if the contents were mostly true." "And what did he say?"

There was no objection of any sort from Mr. Alburn at all. The only objection he made was somewhat before that to the reading of Miranda.

And much later, he asked for a new trial. He made no objection of any kind to my question or to Kebin Haller's response.

THE COURT: All right. Well, the Court, after reading the submissions and listening to the arguments of counsel, will deny the motion for new trial. I'll articulate why, so it's of record and you can use that when you appeal this case.

The most bothersome one to me probably is the first one. That is that the statement, that it was mostly true by the Defendant. It isn't in the record anywhere that through discovery that was given to the Defense that there could have been surprise by that.

Without going into detail of rules on whether those only have to be written or recorded statements, certainly there's an obligation to make the Defense aware of that. I don't find that in this case, that it was anything intentional by the State. It's a two word [p. 31] statement, I guess, which is, mostly true.

However, in this type of motion for a new trial, I don't find that that's sufficient for this Court to order a new trial. I believe that the record will indicate that there was sufficient evidence for the jury to find as they did regardless of that very small piece of evidence. I know Mr. Alburn disagrees with me, his argument about the impact of that; however, for purposes of this motion, that's how I rule on that.

Regarding the second prong of your argument for a motion for new trial, that's violation of the order in limine. Basically, the Court in that, when that happened, and it remembers very well. I'm very aware of the motion in limine, aware of what happened at the trial, is aware of that, that's the comments of the Officer at the Defendant's place of work.

Again there, I guess it's a disagreement between myself and Mr. Alburn. The Court did rule on that. I felt my ruling at that time was proper. I still feel that it's proper. That is that the door was opened. The State was entitled to follow it up with redirect.

It's bothersome to me, the third one regarding discriminatory jury selection. Racial imbalance on the jury. Simply, there is virtually no evidence or a showing that the Court should grant the motion on that [p. 32] basis and will deny it.

Obviously, all three of these can be raised on appeal and should be if the Defense decides to appeal it to the Supreme Court, if I'm wrong about that.

I'll say to those of you that are here, I guess friends and family of the Defendant, regarding that third allegation, say to you that if this Court felt that in any way was improper or involved discrimination of any kind in any improper fashion and that the jury wasn't properly composed, proper venire, and if there was any indication that that was not proper per the law of this land, certainly this Court would grant the motion. But there is no showing, no evidence of that and I'll deny the motion.

In any event, that's the decision of the court. I will enter an order. You may draft that order and the Court will enter the order and set the matter for sentencing.

There's a Presentence Investigation that's been in the file.

MS. MCMURTRY: Yes, Your Honor.

MR. ALBURN: Yes, Your Honor. We received it.

THE COURT: Okay.

MR. ALBURN: The day before yesterday, and in the mail from the Clerk. And I don't know if the Court

* * *

APPENDIX J

STATE OF WYOMING)		IN THE DISTRICT COURT
	:ss.	SECOND JUDICIAL
COUNTY OF CARBON)		DISTRICT
)		Criminal Docket No. 5137
STATE OF WYOMING,)		
Plaintiff,)		(Filed Jan. 8, 1997)
vs.)		
MARIO ESPINOZA,)		
Defendant.)		

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF MOTION FOR NEW TRIAL

THIS MATTER having come before the Court on the Defendant's Motion for a Reconsideration of the Motion for New Trial, the Court having read the arguments of the parties and being otherwise well advised in the premises;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Reconsideration of Motion for a New Trial be denied.

DATED this 8th day of January, 1997.

/s/ Ken Stebner
DISTRICT COURT JUDGE

cc: Carbon County Attorney's Office
Cary Alburn, Attorney for the Defendant
Mario Espinoza, c/o Cary Alburn